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Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 4

JIM GARRISON,
Appellant

versus

STATE OF LOUISIANA,
Appellee

On Appeal from the Supreme Court of Louisiana

JURISDICTIONAL STATEMENT

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Question Presented	4
Statement of the Case	5
The Facts	5
Presentation of the Federal Question	10
The Question is Substantial and Important	11
Appendix:	
Opinion and Judgment of the Supreme Court of Louisiana	29
Opinion of the Criminal District Court for the Parish of Orleans	105

Page

TABLE OF AUTHORITIES

Statutes:

Constitution of Louisiana, Article 7, Section 41 .. 3
Constitution of the United States:
First Amendment 1, 2, 4, 10, 12, 19, 22, 24, 27
Fourteenth Amendment 1, 2, 4, 10, 12, 27
Fox's Libel Law, 32 Geo. III, c. 60 19
Lord Campbell's Libel Act, 6 & 7 Victoria, c. 96 20
La. RS 14:47 ..... 2, 3
La. RS 15:560 11
La. RS 15:571.11 6
Sedition Law, Act of July 14, 1798, 1 Stat. 596 .. 19
28 USC 1257(2) 2, 28
28 USC 1257(3) 2, 28
28 USC 2103 ..... 2, 28

Cases:

Beauharnais vs Illinois, 343 US 250 (1952) 25, 26
Bridges vs California, 314 US 252 (1941) ..12, 14, 17, 22, 25
Chaplinsky vs New Hampshire, 315 US 568 (1942) 2, 13
Craig vs Harney, 331 US 367 (1947) 12, 24
Dahnke-Walker Co. vs Bondurant, 257 US 282 (1921) 2, 13
DeJonge vs Oregon, 299 US 353 (1937) 2, 13
De Libellis Famosis, 5 Coke's Reports 125a, 77 ER 250 (1605) 16, 17
Hartzell vs United States, 322 US 680 (1943) .. 25
The King vs Almon (1765) [Wilmot, Notes of Opinions and Judgments (1802)] 16
New York Trust Co. vs Eisner, 256 US 345 (1921) 13
Nye vs United States, 313 US 33 (1941) 24
Pennekamp vs Florida, 328 US 331 (1946) 12, 27

Page

People vs Croswell, 3 Johnson's Cases 337 (NY-1804) 20
Roth vs United States, 354 US 476 (1957) 26
Schenck vs United States, 249 US 47 (1919) 25
Tutchin, Trial of John, 14 Howell's State Trials 1095 (1704) 18
Wood vs Georgia, 370 US 375 (1962) 12, 27

Other:

Berns, Freedom, Virtue & The First Amendment (1957) 26
Chafee, Freedom of Speech and Press (1955) ... 18
Chafee, Free Speech in the United States (1954) 17, 19, 20, 23, 26
Chenery, Freedom of the Press (1955) 18
87 Cong. Rec. 5836-37 21
Cooley's Constitutional Limitations (8th ed., 1927) 20, 24
Corwin, Freedom of Speech and Press Under the First Amendment, 30 Yale Law Journal 48 (1920) 18, 20
Crosman, The Trial of John Peter Zenger, 10 Rocky Mountain Law Review 258 (1938) 18
Deutsch, Freedom of the Press and of the Mails, 36 Michigan Law Review 703 (1938) 24
Emerson, Toward a General Theory of the First Amendment, 72 Yale Law Journal 877 (1963) 21
Fox, History of Contempt of Court (1927) 16
Fox, The King v. Almon, 24 Law Quarterly Review 266 (1908) 16, 19
Heartman, John Peter Zenger (1934) 18
Hervey and Kelley, Some Constitutional Aspects of Statutory Regulation of Libels on Government, 15 Temple University Law Quarterly 453 (1941) 18

Page

Hudon, Freedom of Speech and Press in America (1963) 15, 16

Johnson, Freedom of the Newspaper Press, 200 Annals of the American Academy of Political and Social Science 60 (1938) ... 23

Kelly, Criminal Libel and Free Speech, 6 Kansas Law Review 295 (1958) 15, 22, 24

Madison, Report on the Virginia Resolutions, 4 Madison's Works (1865) 542 23

Nelles and King, Contempt by Publication in the United States, 28 Columbia Law Review 400 (1928) 20, 22

Note: Clear and Present Danger Re-examined, 51 Columbia Law Review 98 (1951) 24

Note: Constitutionality of the Law of Criminal Libel, 52 Columbia Law Review 521 (1952) 18, 21, 23

Smith, Freedom's Fetters (1956) 23

Stephen, History of the Criminal Law of England (1883) 24

Wilmot, Notes of Opinions and Judgments (1802) 16

SUPREME COURT OF THE UNITED STATES

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No.

JIM GARRISON,

Appellant

versus

STATE OF LOUISIANA,

Appellee

On Appeal from the Supreme Court of Louisiana

Appellant submits this statement to show that the instant appeal is within this Court's jurisdiction, in that the validity of the Louisiana statutory provision, defining and fixing penalties for the crime of defamation, and of a Louisiana constitutional provision providing for trial of misdemeanors without a jury, were brought in question in the State Supreme Court on the ground of their being repugnant to the First and Fourteenth Amendments to the Constitution of the United States, and the decision of that Court was expressly in favor of their validity.

Opinions Below

The opinion of the Supreme Court of Louisiana is reported at 154 So. 2d 400. That of the Criminal District Court for the Parish of Orleans, the court of first instance, has not been reported. Both opinions are printed in the Appendix, at pages 29 and 105 respectively, below.

Jurisdiction

This is a criminal prosecution for defamation, brought against appellant pursuant to Section 47 of Title 14 of the Louisiana Revised Statutes.

The judgment of the Supreme Court of Louisiana was rendered on June 4, 1963. R 173, 226. Rehearing was denied, and the judgment became final and executory, on June 28, 1963. R 226. The notice of appeal to this Court was filed in the Supreme Court of Louisiana on July 11, 1963. R 249.

This Court has jurisdiction of the appeal under 28 USC 1257(2). See *Chaplinsky vs New Hampshire*, 315 US 568 (1942); *DeJonge vs Oregon*, 299 US 353 (1937); *Dahnke-Walker Co. vs Bondurant*, 257 US 282 (1921); and footnote 2, page 13 below. If this appeal should be held not to fall within this Court's jurisdiction under 28 USC 1257(2), this Court has certiorari jurisdiction under 28 USC 1257(3) and 28 USC 2103.

Statutes Involved

The appeal involves the validity, under the First and Fourteenth Amendments to the Constitution of the United States, of the following Louisiana constitutional

and statutory provisions as applied to appellant under the particular facts of this case:

1—Constitution of Louisiana, Article 7, Section 41, 2 West's Louisiana Statutes Annotated—Constitution, 382:

> "All (criminal) cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury."

2—Louisiana Revised Statutes, Title 14, Section 47, 9 West's Louisiana Statutes Annotated—Revised Statutes, 280:

> "§47 Defamation
>
> "Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends:
>
> "(1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or
>
> "(2) To expose the memory of one deceased to hatred, contempt, or ridicule; or
>
> "(3) To injure any person, corporation, or association of persons in his or their business or occupation.
>
> "Whoever commits the crime of defamation shall be fined not more than three thousand dollars, or imprisoned for not more than one year, or both."

Question Presented

Appellant, District Attorney for the Parish of Orleans, made a statement to the press in reply to a statement, critical of appellant, given to the press by a recently retired Judge of the Parish Criminal Court. Appellant's statement charged the Judges of the Court with "misrepresentation of facts", with responsibility for a large backlog of untried criminal cases, with lack of sympathy toward appellant's use of investigators to uncover vice conditions, with blocking appellant's investigations of such conditions, with lack of concern at the paucity of trials for commercialized vice in past years, and with enjoying excessive vacations, and that the Judges' attitude "raises interesting questions about the racketeer influences on our eight vacation-minded judges".

Appellant was charged with having committed the crime of defamation, and was tried and convicted without a jury under the Louisiana constitutional and statutory provisions quoted above.

The Supreme Court of Louisiana affirmed the conviction, holding expressly that the Louisiana constitutional and statutory provisions are valid under the First and Fourteenth Amendments to the Constitution of the United States, and that, despite those Amendments, it need not, because of the difference between defamation and contempt, "consider the issues behind the phrase 'Clear and Present Danger'"; and it held also that "defendant's contention" that he was entitled to "the

procedural safeguard of a trial by jury is without merit".

The refusal by the Supreme Court of Louisiana to apply the clear-and-present-danger test, in affirming appellant's conviction without trial by jury, for criminal defamation in making the foregoing statement, presents the following question for decision by this Court:

> Whether the First and Fourteenth Amendments to the Constitution of the United States permit the State of Louisiana so to apply its constitutional provision for trial of misdemeanors without a jury, and its statutory provision making criminal defamation a misdemeanor, as to convict and sentence a parish District Attorney, without trial by jury, for publication of a statement critical of the official conduct of the Judges of the parish Criminal Court, when the District Attorney's statement plainly involved no clear and present danger, either to preservation of the peace or to the proper administration of justice.

Statement of the Case

The Facts

Following his induction into office as District Attorney of Orleans Parish (coterminous with the City of New Orleans) in May 1962, appellant embarked on a campaign of investigation and prosecution of commercial vice conditions—prostitution, gambling and B-drinking—in New Orleans' Bourbon and Canal Street districts. R 407-408.

Under Louisiana law (Revised Statutes, Title 15, Section 571.11), all fines and forfeitures imposed in criminal cases in Orleans Parish are deposited by the District Attorney in a special account. These funds are to be used in his discretion to defray the expenses of the Criminal District Court of the Parish, and of the District Attorney's office. The statute provides further that "no money shall be paid out of this fund except upon motion by the district attorney of Orleans Parish and approval by a judge of the Criminal District Court of Orleans Parish".

Since re-enactment of the cited statute substantially in its present form in 1959, such funds had been used, in part, to pay for investigations by the District Attorney's office; individual Judges had always approved disbursements from the special account for this purpose; and in the opening stages of appellant's investigation of vice conditions, individual Judges approved his use of the fund to defray the cost thereof. R 551, 630, 719, 725-26.

In August 1962, however, the Judges announced that no further disbursements from the fund would be approved until October, when all of the Judges would have returned from summer vacation and a new system for administering the fund could be established. R 451-52.

On October 4, 1962, the Judges met *en banc*. On the afternoon of that day, appellant was invited to join the meeting. When he arrived, he was advised

that although the relevant statute provides, as stated, for disbursements from the special fund on "approval by a judge" of the Court, no further motions for such disbursements would be approved except with the concurrence of five of the eight Judges. R 415-17, 743-44.

On October 26, 1962, the Judges again met *en banc*, and determined that no further disbursements for investigations by the District Attorney's office would be approved (R 567), and none have been approved since October 4, 1962 (R 737). On November 1, 1962, a recently retired Judge of the Court made a statement to the press, critical of appellant. R 439.

The following day, appellant, when asked by reporters whether he had any comment on this statement, made the remarks which are at issue in this case. R 262-69. These, as reported in the press, are printed in full in the opinion of the Supreme Court of Louisiana. See Appendix at page 31 below. R 41-45. Those portions of appellant's statement which may fairly be considered to constitute the gravamen of the complaint ultimately made, excluding repetitions, are as follows:

> "Apparently the judges have called in all their reserves. Whatever their resulting statement turns out to be, I doubt if the facts will be much more accurate than those in Judge O'Hara's statement. I will cite some glowing examples of misrepresentation . . . . . .
>
> "(After making reference to a backlog of untried criminal cases in Orleans Parish, ap-

pellant continued:) Inasmuch as the judges have been the only continuing caretakers of the criminal courts' operation over the years, it is pretty obvious where the real responsibility lies for the revised backlog of untried cases. District attorneys come and go every four years but the judges and the backlog always seem to be here . . .

"(After referring to Judge O'Hara's charge that the District Attorney's investigators were not made available in court, appellant continued:) Obviously this is nothing more than a petulant slap at our use of investigators to uncover vice conditions in the city—an operation with which the judges have shown a remarkable lack of sympathy. As a matter of fact, so opposed have the judges been to our vice investigations that they completely blocked us from our Bourbon Street investigation of B-drinking and other forms of vice . . . .

"The judges have now made it eloquently clear where their sympathies lie in regard to aggressive vice investigations by refusing to authorize use of the DA's funds to pay for the cost of closing down the Canal Street clip joints . . .

"Again the message is clear: 'Don't rock the boat, son. You are not supposed to investigate anything'. This raises interesting questions about the racketeer influences on our eight vacation-minded judges . . .

"Actually, the time for Judge O'Hara to be active in his concern for the district attorney's office was during the preceding four years when

> there was a complete breakdown of vice prosecution and prosecution of cases in every area. So complete was this breakdown that in the last several years there were almost no trials of any kind for commercialized vice. The judge at no time expressed any concern for the breakdown of the prosecution office . . .
>
> "It is incredible that in this country in 1962 that a man could wait 19 months before his case is disposed of, during which period the judge enjoyed over 300 days' vacation . . ."

The statement related solely to the Judges' official conduct. At no point did it refer to the private conduct of any of them.

The Attorney General filed a bill of information charging appellant with defamation of all eight of the Judges. R 40-45. On the same day, the Supreme Court of Louisiana appointed a District Judge from another district as Judge *ad hoc* to try the case against appellant. R 38.

The trial Judge, although holding that "the defamatory statement might not have been issued without some provocation" (R 988), found appellant guilty, and sentenced him to pay a fine of $1,000 or to serve four months' imprisonment. R 981, 989, 992. Appellant appealed the conviction and sentence to the Supreme Court of Louisiana, which affirmed the actions of the trial court. R 226.

Presentation of the Federal Question

By demurrer and motion to quash (R 51-52), motion for trial by jury (R 54-55) and bills of exception (Nos. 3 and 4, R 100-101, 104-105) filed before the trial, by propositions of law (Nos. 13 and 16, R 81, 84) and bills of exception (Nos. 21 and 23, R 148-49, 156-57) filed during the trial, and by motion in arrest of judgment (R 86) and bill of exception (No. 26, R 168) filed after the trial, appellant asserted that Louisiana's constitutional provision for trial of the charge against him without a jury, and that Louisiana's statutory provision defining and prescribing punishment for the crime of defamation, could not be applied to appellant in this case without violating his rights under the Fourteenth Amendment to the Constitution of the United States, for the reason that his statements were comments on the Judges' official conduct, and did not involve a clear and present danger to the preservation of the peace or to the proper administration of justice.

The trial Judge rejected this contention, overruling the demurrer and motion to quash (R 102-103), denying the motion for trial by jury (R 106-107), qualifying the propositions of law as being applicable only in contempt-of-court proceedings (R 150-51, 158-59), and denying the motion in arrest of judgment (R 169).

Appellant's contention as to unconstitutionality, under the First and Fourteenth Amendments, as applied to this case, of Louisiana's constitutional and statutory provisions for punishment as defamation, without trial

by jury, of the statements at issue, was presented on appeal in his brief (R 171, pages 30-55), as permitted by Louisiana Revised Statutes, Title 15, Section 560.

The rejection of this contention by the Supreme Court of Louisiana, in affirming the conviction and sentence, was express and specific:

> 1—"We conclude that LSA-R.S. 14:47-50 (defining, and prescribing the penalty for, defamation) are not null and void and are not prohibited by the First Amendment to the United States Constitution, guaranteed to citizens of the States by the Due Process Clause of the Fourteenth Amendment to that Constitution"; and
>
> 2—"We conclude that the provisions of Article VII, Section 41, of the Louisiana Constitution of 1921, authorizing trial by the judge alone in misdemeanor cases, are constitutional. We find no prohibition against such provisions in the Constitution of the United States or in the decisions of the United States Supreme Court."

Appendix, pages 65 and 73 below.

The Question is Substantial and Important

The federal question raised in this case presents a significant constitutional issue which, despite its obvious and elemental importance, has never before been presented to this Court for decision, and indeed has

apparently never before been decided directly by any court.

That issue is whether, despite the constitutional guarantee of freedom of speech and of the press under the First and Fourteenth Amendments, a State may so apply its criminal-libel law, and its procedural provisions for trial of misdemeanors, as to convict and sentence a citizen (the prosecuting attorney), without trial by jury, for publication of a statement critical of the official conduct of a group of judges, even though the statement involved no clear and present danger, either to preservation of the peace or to the administration of justice.

This Court has repeatedly held that statements critical of judges may not be punished through contempt-of-court procedures if no clear and present danger to the administration of justice is posed,[1] especially if the person who published the statement is himself a public official concerned with the administration of justice. *Wood vs Georgia*, 370 US 375, 394-95 (1962). Appellant relied primarily on these decisions in support of his position in this case.

The Supreme Court of Louisiana rejected the authority of this Cou. 's decisions on the ground that appellant was charged with defamation, not contempt of court; that "Louisiana treats defamation and con-

[1] *Craig vs Harney*, 331 US 367 (1947); *Pennekamp vs Florida*, 328 US 331 (1946); *Bridges vs California*, 314 US 252 (1941).

tempt as separate offenses"; that, accordingly, "it is unnecessary for us to consider the issues behind the phrase 'Clear and Present Danger'"; and that "defendant's contention that LSA-R.S. 14:47-50 fail to provide the procedural safeguard of a trial by jury is without merit". See Appendix, pages 64-65 below.[2]

As noted above, the Court then expressly rejected appellant's contentions that Louisiana's pertinent constitutional and statutory provisions, as applied in this case, are violative of the First and Fourteenth Amendments.

In *New York Trust Co. vs Eisner*, 256 US 345, 349 (1921), Justice Holmes said that "a page of history is

[2] The fact that appellant contended that Louisiana's constitutional and statutory provisions are unconstitutional, not on their face, but only as applied to him in this case (see page 10 above), does not derogate from this Court's jurisdiction over this appeal from the rejection of that contention below. In *Dahnke-Walker Co. vs Bondurant*, 257 US 282, 288-89 (1921), this Court, in maintaining its writ-of-error jurisdiction (the basis for which was the same as that for its appellate jurisdiction at this time), stated: "In the state court the plaintiff . . . distinctly insisted that as to the transaction in question the Kentucky statute was void . . . because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but applied and enforced the statute. . . . The case is therefore of the class described in the first (writ-of-error) of the provisions which we have quoted from the jurisdictional section. That the statute was not claimed to be invalid *in toto* or for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another." In *Chaplinsky vs New Hampshire*, 315 US 568, 574 (1942), this Court upheld its appellate jurisdiction in a case in which the state court had affirmed a conviction under a state libel statute, as against the contention that the statute, as applied "to the facts disclosed by the record", was violative of the First and Fourteenth Amendments. In *DeJonge vs Oregon*, 299 US 353, 357 (1937), this Court exercised its appellate jurisdiction in a case in which the appellant's contention, that the statute "as applied to him" violated the due process clause, had been rejected below.

worth a volume of logic"; but the holdings of the Court below can be justified neither by logic nor by history.

As a matter of logic, it seems evident that the constitutional protection of criticism of the official conduct of judges, which this Court has long since established in its contempt decisions, would be worthless if a State could circumvent that protection, and convict a citizen for criticism of judges, without a jury trial and without regard for the clear-and-present-danger test, simply by calling the proceeding a criminal-libel, rather than a contempt-of-court, prosecution.

The illogic of such a result is emphasized by the admitted absence from this case, of any threat to the proper disposition of pending litigation, which this Court has held to be the only plausible ground for punishment of judge-criticism even by contempt process (see *Bridges vs California*, 314 US at 271): In its opinion below, the Supreme Court of Louisiana found explicitly that "defendant's expressions set out in the Bill of Information are not criticisms of a court trial or of the manner in which any one of the eight judges conducted his court when in session." See Appendix, page 66 below.

History affords no better basis than logic for distinguishing between punishment of judge-criticism by contempt and by criminal-libel prosecution, or for denying, in the latter, the constitutional safeguards

which protect the former. Not only have contempt and criminal-libel processes evolved concurrently as governmental devices for the suppression of publicly critical speech, but criminal-libel statutes are actually the older, and more common resort, of these twin enemies of the citizen's right to complain of official misconduct.

Criminal-libel process is, historically, the root-evil from which all of our present free-speech principles have really stemmed: "The most ancient and direct instrument for the legal control of communication has been the law of criminal libel." Kelly, *Criminal Libel and Free Speech*, 6 Kansas Law Review 295 (1958).

In the words of a recent commentator, "to trace the history of this body of law (free speech) in England, the starting point is the statute *De Scandalis Magnatum* enacted in 1275 which was political in nature and had as its object the preservation of the realm rather than the redress of private wrong. It provided for imprisonment of anyone who should disseminate false news or 'tales' from which discord might result between the king and his people. The statute was re-enacted in 1378 to include peers, prelates, justices, and various other officials . . . The re-enactments of 1554 and 1559 added 'seditious words' to the statute." Hudon, *Freedom of Speech and Press in America* (1963) 8.

Prosecution of political libels under this law, along with censorship and prosecution of contempts of court, were all eventually entrusted to the Court of Star

Chamber. *Id.*; Fox, *The King v. Almon*, 24 Law Quarterly Review 266 (1908).

As noted above, the original design of the statute *De Scandalis Magnatum* was to punish "political scandal"; "as the law was administered by the Court of Star Chamber the security of the state was regarded as imperilled by seditious libel against the rulers of the state". Hudon, *op. cit.*, 8, 10.

The original purpose of the contempt power was likewise "to keep a blaze of Glory around them (courts and judges), and to deter people from attempting to render them contemptible in the eyes of the Public". Wilmot, *Notes of Opinions and Judgments* (1802) 270, Undelivered Judgment in *The King vs Almon* (1765). [The influence of this undelivered opinion on the development of the law of contempt is traced by Sir John Fox in his *History of Contempt of Court* (1927), Chapter II.]

Later, as the concept that public officials should be exempt from criticism lost ground, new justifications for criminal-libel and contempt prosecutions were asserted—preservation in the one case of the peace, and in the other of the due administration of justice.

By the time of the leading Star-Chamber case *De Libellis Famosis*, at the beginning of the seventeenth century, both bases for criminal-libel actions were considered well-established, though sedition—especially as to judges—was still the preferred ground for com-

plaint: "Every libel (which is called *famosus libellus, seu infamatoria scriptura*) is made either against a private man, or against a magistrate or public person. *If it be against a private man it deserves a severe punishment,* for although the libel be made against one, yet it incites all those of the same family, kindred, or society to revenge, and so tends *per consequens* to quarrels and breach of the peace, and may be the cause of shedding of blood, and of great inconvenience: *if it be against a magistrate, or other public person, it is a greater offense;* for it concerns not only the breach of the peace, but also the scandal of the government; for what greater scandal of government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the King to govern his subjects under him? And greater imputation to the state cannot be, than to suffer such men to sit in the sacred seat of justice, or to have any meddling in or concerning the administration of justice." 5 Coke's Reports 125a, 77 ER 250 (1605).[3]

Following abolition of censorship in seventeenth-century England, criminal-libel trials became the favored governmental weapon, both in the mother country and in the American colonies, against the free dissemination of critical ideas and controversial beliefs. Chafee, *Free Speech in the United States*

[3] Both justifications for contempt actions are still advanced to this day. As late as 1941, this Court had occasion to state, in a contempt case, that "the substantive evil here sought to be averted has been variously described below. It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice." *Bridges vs California,* 314 US 252, 270.

(1954) 18, 499-504; Note: *Constitutionality of the Law of Criminal Libel*, 52 Columbia Law Review 521, 523 (1952). Sedition, rather than breach of the peace, continued to be the acknowledged principal danger guarded against by such actions. See, *e.g.*, the charge to the jury in the *Trial of John Tutchin*, 14 Howell's State Trials 1095, 1127 (1704).

One of the aspects of this persisting use of the criminal-libel proceeding to suppress liberty of expression, was the opportunity it afforded for striking some of the great blows for freedom in Anglo-American history, by the tough-minded juries who acquitted William Penn (on a related charge) and the Seven Bishops in England, and John Peter Zenger in colonial America, in defiance of contrary directions by the court.[4]

These verdicts were, strictly speaking, illegal when rendered, since even after the responsibility for prosecution of libels devolved on the common-law courts,

[4] The constitutional importance of Zenger's acquittal is amply documented. Gouverneur Morris called it "the germ of American freedom, the morning star of that liberty which subsequently revolutionised America." Crosman, *The Trial of John Peter Zenger*, 10 Rocky Mountain Law Review 258, 267 (1938). And "the verdict of this jury has been called 'the greatest victory encompassed in America by the democratic spirit before the signing of the Declaration of Independence and the one that made all others possible.'" Heartman, *John Peter Zenger* (1934) 60. See also Chafee, *Freedom of Speech and Press* (1955) 40; Chamery, *Freedom of the Press* (1955), Ch. VI; Corwin, *Freedom of Speech and Press Under the First Amendment*, 30 Yale Law Journal 48, 51 (1920); Hervey and Kelley, *Some Constitutional Aspects of Statutory Regulation of Libels on Government*, 15 Temple University Law Quarterly 453, 465 (1941); Note: *Constitutionality of the Law of Criminal Libel*, 52 Columbia Law Review 521, 524 (1952).

Star-Chamber influence placed severe limits on the jury's role. It was reserved to the court to determine whether the words at issue were punishable, the jury being charged only to find whether the accused had in fact published them. Chafee, *Free Speech in the United States* (1954) 499-504.

A parallel evolution took place in the contempt area. Contempts by utterance had originally been triable by jury in the common-law courts; but when contempt prosecutions returned to those courts on demise of the Star Chamber, the latter's summary non-jury process was carried over into the common-law contempt procedure. Fox, *The King v. Almon,* 24 Law Quarterly Review 266, 268-70 (1908).

The reaction to the long years of censorship and punishment of critical speech, which had been building in England and America throughout the eighteenth century, finally came to a climax in both countries at its end. In 1791, the United States adopted its Bill of Rights, which included the speech and press guarantees of the First Amendment to the Constitution. The following year, Parliament enacted Fox's Libel Law, which, by recognizing the jury's right to return a general verdict of not guilty in criminal-libel trials, removed all limitations on the jury's function in such cases.

Popular indignation, aroused by the brief American experiment with a Sedition Law, "wrecked the Federalist party", and thereafter "made Sedition Acts unthink-

able".[5] On the heels of Croswell's prosecution for political defamation, New York passed a statute, which became a model for the new nation, mirroring Fox's Libel Law, and establishing the defense of truth and good motives in criminal-libel cases. See *People vs Croswell*, 3 Johnson's Cases 337 (NY-1804). Criminal-libel prosecutions then fell into general disfavor and desuetude, both in this country and (at least following adoption, in 1843, of Lord Campbell's Libel Act admitting the defense of truth) in England.

As expressed by Professor Corwin, "in the long run the protest against the Sedition Act accomplished two results: It laid to rest the idea of a national common law of seditious libel of which the act was merely declaratory; while within the States it rendered prosecution for political libels less and less frequent until they ceased altogether, leaving officials dependent for their protection on the ordinary law of slander and libel." *Freedom of Speech and Press Under the First Amendment*, 30 Yale Law Journal 48, 51 (1920). And see Chafee, *Free Speech in the United States* (1954) 18; 2 *Cooley's Constitutional Limitations* (8th ed., 1927) 898.

The few abortive federal prosecutions for political comment assertedly defamatory, are collected in Justice Jackson's dissent in *Beauharnais vs Illinois*, 343 US 250, 289-90 (1952). It has long since become the settled policy of the United States Government not to prosecute under the District of Columbia's criminal-libel law for

[5] Chafee, *Free Speech in the United States* (1954) 27; 2 *Cooley's Constitutional Limitations* (8th ed., 1927) 900; Nelles and King, *Contempt by Publication in the United States*, 28 Columbia Law Review 400, 406 (1928).

criticism of government officials, because such prosecutions, if successful, "would constitute embarrassment not consistent with our support of freedom of the press". 87 Cong. Rec. 5836-37.

It must, however, be noted at this point, that such few libel prosecutions as have subsisted, have usually involved statements criticizing public officials;[6] a rather clear indication as to which of the traditional justifications for such proceedings—preservation of the peace, or preservation of magistrates from seditious utterances —still prevails, as it evidently did in the case at bar, as the real motivating factor for criminal-libel actions: "But under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation. . . . Criminal libel, when resorted to, can only result in suppressing popular expression. It would not be greatly different in its impact than employment of the law of seditious libel." Emerson, *Toward a General Theory of the First Amendment*, 72 Yale Law Journal 877, 924 (1963).

As the preceding quotation indicates, it is the consensus of constitutional writers, based on the *Zenger* trial, the historical developments in the struggle for free speech at the turn of the eighteenth century, and the fact that criminal libel was the chief means employed for sup-

[6] "The criminal libel cases of the present day indicate, however, that this almost obsolete action is being used by the authorities as a form of reprisal against those who criticize misconduct in office." Note: *Constitutionality of the Law of Criminal Libel*, 52 Columbia Law Review 521, 533 (1952).

pression of publications when the Bill of Rights was adopted, that it was the intention of the Framers of the First Amendment that "both censorship and seditious libel are rejected, and prosecutions for criticism of the government, without direct incitement to law breaking, are made impossible in the United States". Kelly, *Criminal Libel and Free Speech*, 6 Kansas Law Review 295, 310 (1958).[1]

This is no mere Johnny-come-lately concept. In the nineteenth century, Judge Cooley wrote: "An examination of the controversies which have grown out of the repressive measures resorted to for the purpose of restraining the free expression of opinion will sufficiently indicate the purpose of the guaranties which have since been secured against such restraints in the future. Except so far as those guaranties relate to the mode of trial, and are designed to secure to every accused person the right to be judged by the opinion of a jury upon the criminality of his act, their purpose has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon

[1] *Cf.* Nelles and King, *Contempt by Publication in the United States*, 28 Columbia Law Review 400, 406 (1928): "Insofar as a popular reaction which for 118 years made Sedition Acts unthinkable may be assimilated to adjudication of their unconstitutionality, it may seem also to have established the unconstitutionality of punishing libels of courts as contempts"—a proposition endorsed by this Court (subject to the clear-and-present-danger rule) thirteen years later, in *Bridges vs California*, 314 US 252.

them. . . . . If we are correct in this, it would not be in the power of the State legislature to pass laws which should make mere criticism of the constitution or of the measures of government a crime, however sharp, unreasonable, and intemperate it might be." 2 *Constitutional Limitations* (8th ed., 1927) 885, 901.[8]

From this constitutional principle, it follows, first, that "although jury trial in criminal libel cases may not be guaranteed by the Sixth Amendment as reflected in the Fourteenth", it must be placed among the constitutional protections of free speech "ensured by the embodiment of the First Amendment in the Fourteenth".[9]

And, by common consent, the constitutional protections to be afforded persons who are prosecuted for political

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[8] "Except in time of war . . . the American newspaper press, then, may be said to be confirmed in the right to criticize public officials and their acts . . . This freedom was the field on which the historical combats for freedom of the press were fought. It is the right to criticize the government that has been championed in every great defense of free speech and a free press." Johnson, *Freedom of the Newspaper Press*, 200 Annals of the American Academy of Political and Social Science 60, 64 (1938). Accord: Smith, *Freedom's Fetters* (1956) 431; Chafee, *Free Speech in the United States* (1954) 18, 21, 149-52. *Cf. Report on the Virginia Resolutions (1799-1800)*, 4 Madison's Works (1865) 542: "This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws."

[9] See Note: *Constitutionality of the Law of Criminal Libel*, 52 Columbia Law Review 521, 532 (1952). "There is convincing evidence that at the end of the eighteenth century freedom of discussion was thought to demand jury trial in criminal libel cases. Included in this evidence is the passage in England of Fox's Libel Act of 1792, the influence upon colonial feeling of the jury's action in acquitting Zenger in 1735, and the provision made for jury determination of issues of law and fact in early state constitutions as well as

criticism, also include the great substantive safeguard of the clear-and-present-danger test:[10] Sir James Stephen submitted, eighty years ago, that "every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms part. He is finding fault with a servant. To those who hold this view fully, and carry it out to all its consequences, there can be no such offense as sedition. There may indeed be breaches of the peace which may destroy or endanger life, limb, or property, and there may be incitements to such offenses. But no imaginable censure of government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal." 2 *History of the Criminal Law of England* (1883) 299-300.

If this has been the constitutional law of England for 80 years and more, it would be anomalous to a degree, particularly in light of the long struggle against criminal prosecutions for political libel which culminated in the adoption of the First Amendment

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the Sedition Act of 1798." *Id.* Accord: 2 *Cooley's Constitutional Limitations* (8th ed., 1927) 885; Deutsch, *Freedom of the Press and of the Mails*, 36 Michigan Law Review 703, 711 (1938). Also to be noted is the federal statute requiring jury trials in prosecutions for contempt of court by publication, given effect in *Nye vs United States*, 313 US 33 (1941). This Court again emphasized the jury question in reversing a contempt conviction, in *Craig vs Harney*, 331 US 367, 373 (1947).

[10] Kelly, *Criminal Libel and Free Speech*, 6 Kansas Law Review 295, 321-25 (1958). "By applying this stringent rule (the clear-and-present-danger test) since late in the 1930s, the Supreme Court has struck down each challenged interference wherever the legislation was specifically directed against the content of the utterance. This has been true in legislation involving either prior restraint or subsequent punishment." Note: *Clear and Present Danger Re-examined*, 51 Columbia Law Review 98, 99 (1951).

itself,[11] if a State could evade the procedural and substantive bulwarks—trial by jury, and the clear-and-present-danger rule—which this Court has raised in cases arising under the contempt power and under statutes designed to preserve, not merely the peace, but the Republic itself,[12] and could convict and punish a citizen for criticizing public officials without regard for those bulwarks, merely by labeling its prosecution "Criminal Libel" instead of "Contempt of Court" or "Sedition".

In holding that the State of Louisiana may so evade these constitutional safeguards in this case, the Supreme Court of that State relied mainly on the statement, in this Court's opinion in *Beauharnais vs Illinois*, that "libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.'" 343 US 250, 266 (1952). See Appendix, pages 59, 64 below.

But it hardly seems arguable that by this *dictum* this Court meant to turn its back on 700 years of protest and 170 years of constitutional evolution, and to open the floodgates to unrestricted sedition prosecutions disguised as criminal-libel trials. And in fact, the *Beauharnais* opinion itself makes clear that the unprotected "libelous utterances" to which reference is made, are

[11] "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed." *Bridges vs California*, 314 US 252, 265 (1941).

[12] *Schenck vs United States*, 249 US 47, 52 (1919); *Hartzel vs United States*, 322 US 680, 687 (1943).

restricted to "epithets or personal abuse"—"utterances (which) are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality". 343 US at 256-57. The opinion is careful to announce that the group criminal-libel law at issue in that case could not be applied, free of constitutional limitations, to "libels of political parties", since "political parties, like public men, are, as it were, public property". 343 US at 263, in footnote.[13]

In like manner, when it later held that "obscenity is not within the area of constitutionally protected speech or press", this Court was careful to distinguish between unprotected pornography on the one hand, and "material which does not treat sex in a manner appealing to prurient interest" on the other; the latter type of expression falling squarely under the shelter of "the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment." *Roth vs United States*, 354 US 476, 485, 488 (1957).

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[13] Chafee has similarly pointed the distinction between prosecution for socially valueless abuse of private individuals, and "punishing words because they express ideas which are thought to cause a future danger to the State". *Free Speech in the United States* (1954) 149. And see Berns, *Freedom, Virtue & The First Amendment* (1957) 152: "Beauharnais was not punished for anything he said, printed, or believed about the federal government, the state of Illinois, the city of Chicago, or any of their officials; the statute was not a sedition act. He was punished for what he said about other private citizens, over six hundred thousand of them."

Conclusion

It is respectfully submitted that this case presents a serious and substantial question as to whether published criticism of the official conduct of judges, especially when made by a prosecuting attorney closely involved in the administration of judicial business which was the subject of his criticism, is not protected by the First and Fourteenth Amendments from punishment for criminal libel, just as for sedition or contempt of court, without trial by jury and without regard for the question whether the criticism involved a clear and present danger to any interest which the State is entitled to protect.[14]

If this Court should hold that the constitutional safeguards, particularly the clear-and-present-danger test, are applicable in this case, then it follows, almost of course, that appellant's conviction must be reversed, since the Supreme Court of Louisiana recognized expressly that his statement, which could scarcely be considered more derogatory than those involved in this Court's *Pennekamp* and *Wood* decisions (see footnote 1 above and accompanying text), presented no threat to the administration of justice, and there was only slight danger of resort by the Judges to violent conduct to avenge his affront to their dignity.

[14] *Cf. Wood vs Georgia*, 370 US 375, 394-95 (1962): "The petitioner was an elected official and had the right to enter the field of political controversy, particularly where his political life was at stake. . . . The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance."

For these reasons, it is submitted that this appeal falls within this Court's jurisdiction under 28 USC 1257(2); but that if, for any reason, the case should be considered not to fall within this Court's appellate jurisdiction, the issue presented is of such great and obvious constitutional significance as to warrant the exercise of this Court's certiorari jurisdiction, which it has power to do on the basis of the appeal papers, under 28 USC 1257(3) and 2103.

Eberhard P. Deutsch,
Attorney for Appellant.

Deutsch, Kerrigan & Stiles,
René H. Himel, Jr.,
Louis P. Trent,
Of Counsel.

July, 1963.

Opinion and Judgment of the Supreme Court of Louisiana

HAMLIN, Justice:

The defendant, Jim Garrison, appeals from his conviction of the offense of Defamation[1] (LSA-R.S. 14:47) and his sentence to pay a fine of $1,000.00 or, in default of payment of said fine, to serve four months in the Parish Prison.

The Bill of Information charging the defendant with the offense of defamation recites:

> "Jack P. F. Gremillion, Attorney General for the State of Louisiana, who in the name and by the authority of the said State, prosecutes, in this behalf, in proper person comes into the Criminal District Court for the Parish of Orleans, in the Parish of Orleans, and gives the said Court here to understand and be informed that one Jim Garrison late of the Parish of Orleans, on the 2nd day of November in the year of Our Lord, one thousand nine hundred and sixty-two with force and arms in the Parish of Orleans aforesaid, and within the

[1] "Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends:

"(1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or

"(2) To expose the memory of one deceased to hatred, contempt, or ridicule; or

"(3) To injure any person, corporation, or association of persons in his or their business or occupation.

"Whoever commits the crime of defamation shall be fined not more than three thousand dollars, or imprisoned for not more than one year, or both." LSA-R.S. 14:47.

jurisdiction of the Criminal District Court for the Parish of Orleans, did wilfully, unlawfully and maliciously defame each, George B. Platt, Judge of Section 'B', Criminal District Court for the Parish of Orleans and the presiding judge thereof, and one Malcolm V. O'Hara, Judge of Section 'A' of the Criminal District Court for the Parish of Orleans, one Edward A. Haggerty, Jr., Judge of Section 'C', Criminal District Court for the Parish of Orleans, one Thomas M. Brahney, Jr., Judge of Section 'D' of the Criminal District Court for the Parish of Orleans, one J. Bernard Cocke, Judge of Section 'E', Criminal District Court for the Parish of Orleans, one Oliver P. Schulingkamp, Judge of Section 'F', Criminal District Court, for the Parish of Orleans, one Shirley G. Wimberly, Judge of Section 'G', Criminal District Court for the Parish of Orleans, and Bernard J. Bagert, Judge of Section 'H', Criminal District Court for the Parish of Orleans, which said judges constitute all the entire bench of the Criminal District Court for the Parish of Orleans, and did publish and express in the public press of the City of New Orleans to persons other than the parties defamed which said publication and expressions are recited herein below of certain things which tend to expose to hatred, contempt and ridicule and deprive such persons of their benefit of public confidence and social intercourse. The said publication and expressions being contained in the following news item reproduced from the New Orleans States-Item,

(an afternoon daily newspaper published in the City of New Orleans, Parish of Orleans, published on November 2nd, 1962 which reads as follows, to-wit:

" 'TEXT OF GARRISON STAND ON JUDGES

" 'The statement by District Attorney Jim Garrison on his feud with the criminal district court judges follows:

" 'Apparently the judges have called in all their reserves.

"(A reference to the joint meeting of all criminal court judges today.)

" 'Whatever their resulting statement turns out to be, I doubt if the facts will be much more accurate than those in Judge (William J.) O'Hara's statement.

" 'I will cite some glowing examples of misrepresentation of facts.

" 'First of all is the attempt made to counterattack by imputing to this office the responsibility for the overcrowded conditions of the Parish Prison.

" 'Judge O'Hara makes the fantastic implication that somehow the system of operation of my office has created this condition. The short reply to this untruth is that the Parish

Prison was vastly overcrowded the day we were sworn in.

" 'There was not only a backlog of untried cases then. . . there has been for years.

" 'For example, the judge admits in his own statement that the (Leon D.) Hubert office inherited a backlog of 3500 cases. When we came into office in May, the backlog had risen to approximately 4600 cases.

" 'Inasmuch as the judges have been the only continuing caretakers of the criminal courts operations over the years, it is pretty obvious where the real responsibility lies for the revised backlog of untried cases.

" 'District attorneys come and go every four years but the judges and the backlog always seems to be here.

" 'Furthermore, I am sure that Judge O'Hara knows that no district attorney's office in years has pushed more cases to trial than we have in our first six months of office.

" 'We have prosecuted approximately 40 jury trials already—despite the fact that the winter term of the courts has just begun.

" 'An objective study by an outside agency will reveal that this is at least as many trials as were held the last two years prior to our arrival.

" To go on to another misrepresentation, Judge O'Hara has made the incredible statement that we have pulled our investigators away from the courts. The truth is that our investigators are with the trial assistant, invariably within arm's reach of the assistant, in full sight of the judge in every courtroom throughout every trial.

" 'Obviously this is nothing more than a petulant slap at our use of investigators to uncover vice conditions in the city—an operation with which the judges have shown a remarkable lack of sympathy.

" 'As a matter of fact, so opposed have the the judges been to our vice investigations that they completely blocked us off from our Bourbon Street investigations of B-drinking and other forms of vice.

" 'This was accomplished by the judges tying the purse strings of the district attorney's fines and fees and informing me that no further money could be used in the investigation of any vice conditions.

" 'The judges have specifically directed that the district attorney's office 'should not investigate anything' and informed me that they would allow me to use no further money from my large fines and fees—presently $40,000—for any form of vice investigation.

" 'In certain areas where we have spent borrowed money to keep operating against vice—in major handbook operations as well as in B-drinking cases—the judges have instructed me that this money will not be replaced out of fines and fees. I must pay this out of my own pocket.

" 'Again the message from the judges is clear. They do not want the district attorney's office to investigate anything.

" 'Interestingly enough, had I let them stop me in August as they attempted to do, I would not have been able to keep the pressure on the Canal Street B-joints, which ultimately resulted in the closing of all of them.

" 'I succeeded in keeping up the pressure on these places, despite the judges' tying of the purse strings, by my personal loan from the Bank of New Orleans.

" 'The Judges have now made it eloquently clear where their sympathies lie in regard to aggressive vice investigations by refusing to authorize use of the DA's funds to pay for the cost of closing down the Canal Street clip joints.. closed them, despite their (the judges') obvious attempts to block me, they now seek to slap the DA on the wrist by making him pay for this successful operation out of his pocket.

" 'Again the message is clear: 'Don't rock the boat, son. You are not supposed to investigate anything.'

" 'This raises interesting questions about the racketeer influences on our eight vacation-minded judges. This is a matter regarding which I will have (much[2]) more to say a little later.

" 'To go on to another misrepresentation of Judge O'Hara's statement, I am sure that he well knows that we did not throw out the trial preparation system of Mr. Hubert.

" 'That was junked four years ago by the preceding DA's office and there was no comment by Judge O'Hara about its disappearance throughout the four years.

" 'As a matter of fact, this office gives a special attention to the preparation of trial and has adopted a number of the excellent trial preparations of the Hubert era.

" 'To give a specific example, our office now is in the process of printing for distribution to every criminal defense attorney and every court the trial docket for the month to come.

" 'Our setting of particular cases on particular dates is so arrived at to avoid such conflicts as having cases in different courts by defendants or an attorney on the same day.

[2] The word "much" is contained in the newspaper article.

" 'Interestingly enough, this program was abandoned by the previous DA's administration, and again there was not a word from Judge O'Hara.

" 'O'Hara has now developed—subsequent to his retirement—a concern for the efficient operation of the trial dockets.

" 'Actually, the time for Judge O'Hara to be active in his concern for the district attorney's office was during the preceding four years when there was a complete breakdown of vice prosecution and prosecution of cases in every area.

" 'So complete was this breakdown that in the last several years there were almost no trials of any kind for commercialized vice. The judge at no time expressed any concern for this breakdown of the prosecution office.

" 'The first discernible interest on their part with regard to the district attorney's handling of vice cases arrived the past summer when it became apparent that this office was achieving success in its effort to eliminate the B-drinking racket in New Orleans.

" 'This is when, to my astonishment, I suddenly received instructions—through Judge O'Hara himself, speaking for the rest of the judges—that I could no longer spend any money out of fines and fees for anything.

" 'Since this was in August—there was not to be an en banc meeting until October—when all the judges returned from their vacations—this would have had the effect of blocking our vice investigations. This is when I borrowed money from the bank and continued to investigate B-drinking in spite of the judges.

" 'If the judges would show half as much interest in solving dangerous overcrowded conditions of the Parish Prison, and this overcrowding has been present for years not just the last few weeks, as they have shown in their successful attempts at completely blocking the anti-B-drinking operations of my office, the Parish Prison problem would be ended overnight.

" 'The efficiency and dispatch with which the judges of the present court stopped my undercover investigations of B-drinking and the resolve which they demonstrated in their uniform opposition to any continued vice investigation by this office would gladden the heart of any efficiency expert.

" 'It is unfortunate that there is no comparable interest on their part with regard to the problem of inmates awaiting trial month after month in the Parish Prison.

" 'It is incredible that in this country in 1962 that a man could wait 19 months before his

case is disposed of, during which period the judge enjoyed over 300 days vacation.

" 'There are now approximately 520 prisoners awaiting trial out of a prison population of 758. I think this is an outrageous condition which should be answered not by petulant words by the judges but by action—to immediately increase the number of trial days of this court so that the men can be brought to a speedy trial.'

contrary to the form of the Statute of the State of Louisiana in such case made and provided and against the peace and dignity of the same.

(Signed) JACK P. F. GREMILLION
Attorney General for the
State of Louisiana"

The record reflects that the statement or expression set forth in the foregoing Bill of Information was given by the defendant, Jim Garrison, District Attorney for the Parish of Orleans, to the New Orleans press and published by said press, after the judges of the Criminal District Court refused to sign orders for the payment of funds out of the Fines and Fees Fund for expenditures of the District Attorney. The District Attorney had taken no legal steps to compel the judges to sign said orders.

The Bill of Information, supra, was filed shortly after defendant's statement was published.

On November 13, 1962, the Supreme Court of the State of Louisiana appointed Honorable William H. Ponder, Judge of the Eleventh Judicial District Court, to sit as Judge ad hoc for the Criminal District Court for the Parish of Orleans for the trial of the instant cause, No. 177-418 of the Docket of the Criminal District Court for the Parish of Orleans, entitled "State of Louisiana versus Jim Garrison." Article VI, Section 12, of the Louisiana Constitution of 1921. LSA-R.S. 15:307. The order was effective immediately. The Presiding Judge of Section "C" of the Criminal District Court, to which section this case had been assigned, recused himself, and Judge Ponder ascended the Bench for the commencement of trial.

The defendant thereafter filed a Motion to Recuse, alleging:

> "That the Honorable P. F. Jack Gremillion, Attorney General for the State of Louisiana, who prosecutes this case in the name of the State of Louisiana, has publicly stated in the public press and otherwise, his belief that the integrity of the entire judiciary of the State of Louisiana is an issue in this case and has thus announced his intention of making the integrity of the Louisiana judiciary an issue in the trial thereof; that the said utterances and the proposed trial have had and will have the effect of making the entire judiciary of the State of Louisiana an interested party to this case within the meaning of the recusation statutes of the State of Louisiana.

"That the constitutional and statutory provisions of the State of Louisiana authorizing the arbitrary appointment by the Louisiana State Supreme Court of a trier of fact for a particular case, are unconstitutional and null and void as violative of the due process provisions of the Fourteenth Amendment, and that the appointment of the said Honorable William H. Ponder, under color of authority of the said provisions of the Louisiana State Constitution and Revised Statutes, is therefore null and void and of no force and effect."

The trial judge denied the above Motion to Recuse, and Bill of Exceptions No. 1 was reserved to his ruling.

In this Court appellant argues that:

"***the Honorable William H. Ponder prejudged this case, and had already—subconsciously—found the accused guilty of defamation when the trial began on January 21, 1963. In support of this contention we call the Court's attention to the fact that from the first moments of the trial, and continuously thereafter during the many days which the trial lasted, Judge Ponder referred in no uncertain terms to the per curiams which he would write in this case. No citation of authority is needed to prove that, once jeopardy has set in, per curiams are only written by a trial judge in the event the accused is found guilty and appeals from his judgment of conviction.***"

Appellant further states:

"It is the position of the accused that whether his guilt or innocence was to be determined by a judge or a jury, he was not provided with due process of law if the trier of fact was subject to arbitrary selection, particularly by the judiciary of the State of Louisiana. Even without the judiciary's interest in this matter, such an appointment would not provide a defendant in a misdemeanor case with due process since the logical extension of such a procedure could be to give the Supreme Court the power to appoint the jury in a felony matter. It is submitted that only a jury properly drawn, selected and empaneled, or a judge who has been duly elected to an office specifically empowered to decide guilt or innocence in criminal cases in a particular jurisdiction provides an accused with due process of law.

"In the instant case the Criminal District Court Judges took a most active and vigorous part in the prosecution of this accused. The integrity of the entire state judiciary was threatened and questioned by the widely publicized opinion of the Attorney General. In the minds of the general public this case became the case of the District Attorney versus the Judiciary. A verdict for the defendant would have condemned the judiciary, particularly in the eyes of the public. The judiciary could not stand in a position of the accusors, the judge, the jury and the executioners and give Jim Garrison a constitutional trial."

Article VII, Section 10, of the Louisiana Constitution of 1921, provides that the Supreme Court of the State of Louisiana shall have control of and general supervision over all inferior courts. Article VII, Section 12, of the Louisiana Constitution of 1921, empowers this Court to make an appointment such as was made herein. The appointment was therefore not in violation of any of the provisions of the State Constitution. We find no federal prohibition with respect to an appointment such as the instant one; it therefore follows that defendant's complaints with respect to a violation of the Fourteenth Amendment to the United States Constitution are without merit. The record is barren of any showing that the defendant suffered prejudice by the refusal of the trial judge ad hoc to recuse himself. LSA-R.S. 15:557. Defendant's arguments that he was deprived of due process of law, and that the Bill of Information should be dismissed because there is no proper judge in the State of Louisiana to try him, are also without merit.

LSA-R.S. 15:303[3] sets forth the causes for which any judge in any criminal case shall be recused; none of

[3] "The causes for which any judge in any criminal case shall be recused, shall be as follows: 1) His being interested in the cause; but in any cause in which the state, or one of its political subdivisions, or any religious corporation, is interested, the fact that the judge is a citizen of the state or a resident of the political subdivision; or pays taxes thereto, or that he is a member of the religious corporation, shall not constitute a ground for recusation. 2) His being the spouse of the accused or the party injured or one of the attorneys; his being related to the accused or to the party injured or to the spouse of the accused or the party injured within the fourth degree, or to one of the attorneys or to the spouse of one of the attorneys within the second degree. 3) His being a material witness in the cause. 4) His

these causes are applicable to the instant trial judge. A reading of the Motion to Recuse reflects that it contains general statements of conclusions, which do not constitute grounds for recusation. Under the circumstances, the trial judge could rule upon the Motion to Recuse, and he acted properly in ruling upon it.

> "The jurisprudence of this State is well-settled that if the allegations of the petition for the recusation of a judge are mere general statements of conclusions that the judge is prejudiced and biased against or hostile to the defendant because of personal or political reasons, or that if the petition does state facts which, if proved, would not constitute a legal ground for recusation, the judge who is sought to be recused may himself overrule the motion and need not refer it to another judge for trial. ***" State v Doucet, 199 La. 276, 5 So.2d 894. See, State v Laborde, 214 La. 644, 38 So.2d 371.

As stated supra, defendant argues that the trial judge had prejudged this case, and had already—subconsciously—found the accused guilty of defamation when the trial began on January 21, 1963. Defendant cites, among others, the following remarks of the trial judge:

> "***The Court has sustained any statements made after the objection has been made. It

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having been employed or consulted as an attorney in the cause or his having been associated with an attorney during the latter's employment in the cause. 5) His having performed any judicial act in the cause in any other court." LSA-R.S. 15:303.

will be more fully covered in the per curiam of the Court.***"

"***The Court will set forth more fully its legal reasons for this ruling on these bills of exception in its per curiam, which will be attached to and made part of the bill of exceptions."

"***the Court allows it to be admitted, and the Court will assign its reasons for the admission in a per curiam, which will be attached to the Bill of Exception.***"

We do not agree with counsel's argument;[4] the record is replete to the effect that the trial judge did not prejudge this matter. It is clear to us that an experienced judge such as Judge Ponder (the trial judge herein) meant that he would amplify his rulings in his per curiams in the event of an appeal. Before rendering judgment, he aptly stated:

"***So in referring to my per curiam, the question of the per curiam, throughout the trial of the case, I want to qualify that to the extent that I intended, and if there be—there was no pre-judging of the case, but if there were intended to be reserved a bill of exception at any time during the trial of the case, my per curiam would further amplify my reasons."

[4] Defendant states in brief, "Of course we realize that there was no conscious prejudging of Garrison's case by Judge Ponder.***"

Bill of Exceptions No. 1 is without merit.

Bill of Exceptions No. 2 was reserved to the trial court's overruling of defendant's application for a Bill of Particulars. The application set forth the following questions:

"1.

"What are the exact words, phrases and/or sentences of the statement set forth in the Bill of Information that are alleged to be defamatory as to the judges named in the said Bill of Information?

"2.

"What are the exact words, phrases and or sentences contained in the said quoted statement that tend to expose to hatred, contempt or ridicule the judges of the Criminal District Court named in the said Bill of Information, or to deprive them of their benefit of public confidence and social intercourse?

"3.

"Does the State contend that the statement of the defendant set forth in the Bill of Information contains any allegations of fact which are not true?

"4.

"If the answer to Paragraph 3 above is in the affirmative, please set forth the exact words, phrases, and or sentences containing

allegations of fact which are alleged by the State to be untrue."

The State answered the above questions as follows:

"I.

"The State will rely upon the entire article as quoted in the Bill of Information.

"II.

"The State will rely upon the entire article as quoted in the Bill of Information.

"III.

"The State will contend that the statement of the defendant set forth in the Bill of Information constitutes malice in law and also malice in fact.

"IV.

"The entire expression and publication as quoted in the Bill of Information will be used as the basis on the trial as the alleged violation of the statute. The State will also prove the allegation of fact that the said statement was made and published by the said defendant on the date set forth in the indictment."

In this Court defendant contends that:

"In failing to order the State to tell this accused the exact words, phrases and sentences in the November 2 statement which the State contended were defamatory or untrue, the

trial judge abused the discretion vested in him by Article 288 of the Code of Criminal Procedure,[5] R.S. 15:288, to the detriment and disadvantage of the accused. See State v Butler 229 La. 788, 86 So.2d 906[6]. The Statement which forms the basis of this prosecution is quite long, and the trial court placed an unfair burden on this accused when it denied the Application."

Initially it is to be observed that when a party is charged with criminal defamation, "The words contained in the statement are to be given their ordinary meaning unless it is shown that they were capable of being used and were in fact used with a different meaning. The meaning of the statement is to be determined from an examination of the statement as a

[5] "Defects in indictments can be urged before verdict only by demurrer or a motion to quash, and the accused is not entitled to any bill of particulars as to the subject-matter charged in the indictment, but the trial judge may, in his discretion, require the district attorney to file in the case such data as, in the opinion of the judge, may be sufficient."

[6] In State v Butler 229 La. 788, 86 So.2d 906, the defendant was charged with unlawfully possessing, having under his control, selling, and delivering marijuana. The State refused to answer his application for a bill of particulars. Pertinent information sought was the names of the persons to whom defendant was alleged to have sold and to have delivered the marijuana. This Court granted defendant a new trial, stating, "However, while it is discretionary with the trial judge, he cannot arbitrarily refuse to order the State to furnish 'essential particulars.' That is exactly what the trial judge refused to do in this case." In a per curiam written on refusal of an application for rehearing, we stated that this Court must decide each case on the issues presented; and, in the matter involved, after considering the language of the bill of information, we said that we were of the opinion that the accused was entitled to the information sought so that he could adequately prepare his defense, and that in refusing to order the State to furnish the information the trial judge abused his discretion.

whole. The statement is to be interpreted in the light of the surrounding circumstances, and words apparently innocent may be shown to have been defamatory in fact." Wharton's Criminal Law and Procedure, 1957, Volume II, Section 884, Page 750. In State v Lambert 188 La. 968, 178 So. 508, (a prosecution in which the defendant was charged with libel), we held that in analyzing a document and determining its legal effect, the document must be considered as a whole. In interpreting articles of the Louisiana Criminal Code, LSA-R.S. 14:3 provides that the articles of the Code cannot be extended by analogy so as to create crimes not provided for therein; and, in order to promote justice and to effect the objects of the law, all of the provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision.

Under the circumstances of this case, we find that the State's answer (Art. IV supra), to the effect that the entire expression and publication as quoted in the Bill of Information would be used as the basis on the trial as the alleged violation of the Statute, was sufficient to enable the defendant to adequately prepare his defense. Additionally, the State informed the defendant (Art. III, supra) that it would contend that the statement of the defendant set forth in the Bill of Information constituted malice in law and also malice in fact. We conclude that there was no need for the State to further particularize exact words, phrases, and sentences.

> "***The State is not required to reveal in advance of the trial the facts on which it will rely in seeking a conviction." State v Mills 229 La. 758, 86 So:2d 895, Cert. denied, 77 S. Ct. 51, 52, 352 U.S. 834, 1 L.ED. 2d 53.

The proper function of a Bill of Particulars is to inform the accused in greater detail of the nature of the crime of which he is charged. State v Simpson 216 La. 212, 43 So.2d 585, Cert. denied, 70 S. Ct. 625, 339 U.S. 929, 94 L.Ed. 1350. We find that the answer of the State in the instant case performed the proper function of giving the defendant the details he required.

The trial judge exercised the discretion vested in him by LSA-R.S. 15:288 (Footnote 5, supra). We find that he did not abuse his discretion; we also find that the defendant did not suffer prejudice by the trial judge's overruling of the Motion for a Bill of Particulars. LSA-R.S. 15:557.

> "The complaint is without substance The granting or refusal of a bill of particulars addresses itself to the sound discretion of the trial judge. State v Agusta 199 La. 896, 7 So.2d 177; Articles 235, 288, Code of Criminal Procedure.***" State v Poe, 214 La. 606, 38 So.2d 359.

> "We reiterate that the matter of furnishing a Bill of Particulars rests largely in the discretion of the trial judge, and his discretion will not be disturbed unless there is error in

the ruling complained of to the detriment or disadvantage of the accused.***" State v Butler 229 La. 788, 86 So.2d 906.

Bill of Exceptions No. 2 is without merit.

Bill of Exceptions No. 3 was reserved to the trial court's overruling of defendant's Demurrer and Motion to Quash, which recites:

"***the said information and the matters therein are, as therein alleged and set forth, not sufficient in law to compel him, the said Jim Garrison, to answer thereto, for the following reasons, to-wit:

"1.

"That the statement set forth in the Bill of Information attributed to the defendant herein, Jim Garrison, contains no allegations of fact which are defamatory, or which could through any reasonable interpretation, tend to expose to hatred, contempt or ridicule or to deprive of their benefit of public confidence and social intercourse any of the judges of the Criminal District Court therein named as the persons defamed.

"2.

"That the statement set forth in the Bill of Information affirmatively reveals itself to be a comment on the conduct of persons in respect to public affairs and as such protected

by a qualified privilege; that despite the allegation of malice contained in the said Bill of Information herein, the statement attributed to the defendant affirmatively shows the absence of malicious motive; that the said statement shows the utterances contained therein to be in response to a previous public criticism by one Judge William O'Hara, and in defense of the defendant's performance of his duties as District Attorney in combating organized vice operations in the City of New Orleans.

"3.

"That to hold the statement set forth in the Bill of Information to be a violation of Revised Statute 14:47 or to interpret the said R.S. 14:47 defining the crime of defamation so as to include within the scope thereof the statement set forth in the Bill of Information in this case would violate the provisions of the First Amendment of the Constitution of the United States prohibiting abridgment of freedom of speech as the said amendment is made applicable to the State of Louisiana through the Fourteenth Amendment of the United States Constitution."

In this Court defendant argues:

"1. The criminal statutes defining defamation under which the charge against Garrison has been brought, Articles 47-50 of the Louisiana Criminal Code. R.S. 14:47-50, as well as

that portion of Article 1, Section 3, of the Louisiana Constitution authorizing such laws, are absolutely null and void in that they are prohibited by the First Amendment to the United States Constitution, guaranteed to citizens of the states by the Due Process Clause of the Fourteenth Amendment to that Constitution.

"A. Any law which in any fashion curtails freedom of expression violates the First Amendment to the Federal Constitution.

"B. In the alternative, these statutes are phrased in such broad general terms that they cover activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press, and for this reason Articles 47-50 are void.

"C. Articles 47-50 fail to provide the procedural safeguard of a trial by jury which is essential to the protection of First Amendment rights.

"2. In the alternative it is contended that in the event Articles 47-50 defining the crime of defamation, R.S. 14:47-50, are found not to violate the Federal Constitution, still the accused's conviction of defamation for the statements set out in the bill of information filed herein deprives him of his right to freedom of expression, guaranteed to citizens of Louisiana by the Due Process Clause of the Fourteenth Amendment and the First Amendment to the United States Constitution."

Defendant also contends that the trial judge committed error in his refusal to apply the "Clear and Present Danger" test to this prosecution.

In his per curiam, the trial judge states that he would not pass upon defendant's first contention that the statement set forth in the Bill of Information was not defamatory so as to bring it within the statutory provisions of LSA-R.S. 14:47, because he did not think that the contention was properly presented on a Motion to Quash. He said that qualified privilege and malice were involved, and that proof thereof would require evidence, particularly on the issues of truth or falsity.

In State v Lambert 188 La. 968, 178 So. 508, we said, "The question as to whether a communication is privileged involves questions of fact as well as of law. State v Whitmire 166 La. 195, 116 So. 849. Where the facts are not disputed the question of privilege becomes one of law. Odgers on Libel and Slander 2d Ed., Sec. 183, p. 216; Newell on Slander and Libel, 4th Ed., Sec. 345, P. 385." In State v Masino 214 La. 744, 38 So.2d 622, we held that evidence may be taken on a Motion to Quash an indictment, but evidence is limited to procedural matters and may not include a defense on the merits.

In the publication set forth in the Bill of Information, the defendant states, among other things, that "* * * It is pretty obvious where the real responsibility lies for the revised backlog of untried cases"; that, "* * * so opposed have the judges been to our vice investi-

gations that they completely blocked us off from our Bourbon Street investigations of B-Drinking and other forms of vice"; that, "This raises interesting questions about the racketeer influences on our eight vacation-minded judges. * * *"; that, "* * * a man could wait 19 months before his case is disposed of, during which period the judge enjoyed over 300 days vacation"; and that, "There are now approximately 520 prisoners awaiting trial out of a prison population of 758." These are all assertions of fact which require the hearing of evidence.

We therefore find that the trial judge could not have passed upon the contention raised by the defendant in the first paragraph of his Demurrer and Motion to Quash without hearing evidence on matters other than procedural ones; under the jurisprudence, supra, he was correct in his ruling.

In his per curiam, the trial judge further states that he would not pass upon defendant's second contention that the Bill of Information is a comment on the conduct of persons in respect to public affairs and as such protected by a qualified privilege, because, "* * * the defendant would necessarily have to have a reasonable belief as to the truth of his comment as set forth in LSA-R.S. 14:49.[7] Also, it is well established that

[7] "A qualified privilege exists and actual malice must be proved, regardless of whether the publication is true or false, in the following situations: 1) Where the publication or expression is a fair and true report of any judicial, legislative, or other public or official proceeding, or of any statement, speech, argument, or debate in the course of the same. 2) Where the publication or expression is a comment made in the reasonable belief of its truth, upon, a) The conduct of a

proof of actual malice may destroy a qualified privilege.[8] Therefore, this could only be determined after trial, and was not such as would authorize the sustaining of a motion to quash."

We find that the trial judge was correct in not passing on the second contention raised in defendant's Demurrer and Motion to Quash. Reviewed in association with LSA-R.S. 14:48-49, it shows that it presents matters on which evidence would have had to be heard during trial; it was therefore not subject to the pleadings advanced.

In our discussion of the third contention raised in the Demurrer and Motion to Quash, we initially observe

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person in respect to public affairs; or b) A thing which the proprietor thereof offers or explains to the public. 3) Where the publication or expression is made to a person interested in the communication, by one who is also interested or who stands in such a relation to the former as to afford a reasonable ground for supposing his motive innocent. 4) Where the publication or expression is made by an attorney or party in a judicial proceeding."

[8] "Where a non-privileged defamatory publication or expression is false it is presumed to be malicious unless a justifiable motive for making it is shown.

"Where such a publication or expression is true, actual malice must be proved in order to convict the offender." LSA-R.S. 14:48.

"There shall be no prosecution for defamation in the following situations: 1) When a statement is made by a legislator or judge in the course of his official duties. 2) When a statement is made by a witness in a judicial proceeding, or in any other legal proceeding where testimony may be required by law, and such statement is reasonably believed by the witness to be relevant to the matter in controversy. 3) Against the owner, licensee or operator of a visual or sound broadcasting station or network of stations or the agents or employees thereof, when a statement is made or uttered over such station or network of stations by one other than such owner, licensee, operator, agents or employees." LSA-R.S. 14:50.

that Article 1, Section 3, of the Louisiana Constitution of 1921, provides that, "No law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that liberty.*" (Emphasis ours.) The First Amendment to the United States Constitution recites that, "Congress shall make no law * * * abridging the freedom of speech * * *." The Fourteenth Amendment to the United States Constitution provides that, "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

These constitutional provisions will be considered hereinafter in connection with LSA-R.S. 14:47-50, quoted supra. They will be considered in the light that. "The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state." Schneider v Irvington, 308 U.S. 147-165, 60 S. Ct. 146, 84 L.Ed. 155.

In Roth v United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, we find the following statement with respect to the guaranties of freedom of expression:

> "The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution gave no absolute

protection for every utterance. Thirteen of the 14 states provided for the prosecution of libel,[9] and all of those states made either blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to publish 'any filthy, obscene, or profane song, pamphlet, libel or mock sermon' in imitation or mimicking of religious services. ***" (Emphasis ours.)

"In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. Beauharnais v. People of State of Illinois, 343 U.S. 250, 266, 72 S. Ct. 725, 735, 96 L. Ed. 919. * * *

* * *

"All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area as more important interests. * * *"

In Beauharnais v. People of the State of Illinois, 343 U. S. 250, 72 S. Ct. 725, 96 L. Ed. 919, the defendant was charged by information in that he "did unlaw-

[9] Libel, slander, and malicious prosecution are all methods of defamation." 53 C.J.S. Libel and Slander, Sec. 1, p. 31.

fully . . . . exhibit in public places lithographs, which publications portray depravity, criminality, unchastity or lack of virtue of citizens of Negro race and color and which exposes (sic) citizens of Illinois of the Negro race and color to contempt, derision, or obloquy * * *." Beauharnais challenged the statute under which he was charged as being violative of the liberty of speech and of the press guaranteed as against the States by the Due Process Clause of the Fourteenth Amendment. The United States Supreme Court affirmed the conviction, making the following pertinent statements in its decision:

> "The statute before us is not a catchall enactment left at large by the State court which applied it. * * * It is a law specifically directed at a defined evil, * * *"

> "Libel of an individual was a common-law crime, and thus criminal in the colonies. Indeed, at common law, truth or good motives was no defense. In the first decades after the adoption of the Constitution, this was changed by judicial decision, statute or constitution in most States, but nowhere was there any suggestion that the crime of libel be abolished. Today, every American jurisdiction—the forty eight States, the District of Columbia, Alaska, Hawaii and Puerto Rico—punish libels directed at individuals. * * *"

> "Every power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against

criminal libels sanctioned by centuries of Anglo-American law. * * *"

"Libelous utterances, not being within the area of constitutionally protected speech, it is unnecessary either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."

The United States Supreme Court has considered a number of cases cited by defendant, in which the defendants who were charged with contempt pleaded the protection of "Freedom of Speech." Before discussing these cases, we feel it pertinent to remark that under our Louisiana law the offense of defamation and the offenses of contempt and constructive contempt are not the same.

Constructive Contempt, West's LSA-C.C.P., Art. 224(8), is defined in part as, "Comment by a newspaper or other medium for the dissemination of news upon a case or proceeding, then pending and undecided, which constitutes a clear, present, and imminent danger of obstructing or interfering with the orderly administration of justice, by either influencing the court to reach a particular decision, or embarrassing it in the discharge of its judicial duties."

In Schenck v. United States, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470, the United States Supreme Court spoke of "Clear and Present Danger" as follows:

> "* * *The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. * * *"

In Bridges v. California, 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192, the defendants were adjudged guilty and fined for contempt of court; their convictions rested upon comments published in newspapers pertaining to pending litigation. Defendants challenged the State's action as an abridgment, prohibited by the Federal Constitution, of freedom of speech and of the press. In reversing the conviction, the United States Supreme Court stated in the beginning of its opinion that, "It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable." The Court went on to discuss the theory of evil, stating, "Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial; it said, "* * * we are convinced that the judgments below result in a curtailment of expressions that cannot be dismissed as insignificant. If they can be justified at all, it must be in terms of

some serious substantive evil which they are designed to avert. The substantive evil here sought to be averted has been variously described below. It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice."[10]

Pennekamp v. Florida, 328 U.S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295, concerned contempt proceedings in which the defendant, Associate Editor of the Miami Herald, was charged with being contemptuous of the circuit court and its judges, in that he had published two editorials alleged to be unlawfully critical of the administration of criminal justice in certain cases then pending before the court. The United States Supreme Court reversed the conviction of the State Court on the theory of "Clear and Present Danger," stating, "The comments were made about judges of courts of general jurisdiction—judges selected by the people of a populous and educated community. They concerned the attitude of the judges toward those who were charged with crime, not comments on evidence or rulings during

[10] It is interesting to note that the Louisiana State Supreme Court followed the Bridges rule in a contempt proceeding, Graham v. Jones, 200 La. 179, 7 So. 2d 703, stating: "However, under the decision of the Supreme Court of the United States in the Bridges v. California and Times-Mirror Company v. Superior Court case, this proceeding for contempt against respondent must be discharged. * * *As we have pointed out in our opinion handed down today on the rules for contempt against the three New Orleans news papers, 7 So. 2d 688, the decision of the Supreme Court of the United States in matters of contempt has repudiated the test of reasonable tendency heretofore prevailing and has substituted therefor the test of clear and present danger. Applying that test to the publication under review, we are bound to hold that there was no clear and present danger that the editorial would or could sway the five members of this Court from acting according to their convictions in declaring that the Reorganization Amendment was unconstitutional."

a jury trial. Their effect on juries that might eventually try the alleged offenders against the criminal laws of Florida is too remote for discussion. Comm nt on pending cases may affect judges differently. It may influence some judges more than others. Some are of a more sensitive fiber than their colleagues. The law deals in generalities and external standards and cannot depend on the varying degrees of moral courage or stability in the face of criticism which individual judges may possess any more than it generally can depend on the personal equations or individual idiosyncrasies of the tortfeasor. * * * We are not willing to say under the circumstances of this case that these editorials are a clear and present danger to the fair administration of justice in Florida. Cf. Near v. Minnesota, 283 U.S. 697, 714, 715, 75 L. ed. 1357, 1366, 1367, 51 S. Ct. 625."

Craig v. Harney, 331 U.S. 367, 67 S. Ct. 1249, 9 L. Ed. 1546, involved contempt proceedings for an editorial challenging a Texas court's procedure. In reversing the conviction, the United States Supreme Court stated:

> "* * *But there was here no threat or menace to the integrity of the trial. The editorial challenged the propriety of the Court's procedure, not the merits of its ruling. Any such challenge, whether made prior or subsequent to the final disposition of a case, would likely reflect on the competence of the judge in handling cases. But as we have said, the power to punish for contempt depends on a more substantial showing. Giving the editorial all of

the vehemence which the court below found in it we fail to see how it could in any realistic sense create an imminent and serious threat to the ability of the court to give fair consideration to the motion for rehearing.

"There is a suggestion that the case is different from Bridges v. California * * *in that we have here only private litigation, while in the Bridges Case labor controversies were involved, some of them being criminal cases. The thought apparently is that the range of permissible comment is greater where the pending case generates a public concern. The nature of the case may, of course, be relevant in determining whether the clear and present danger test is satisfied. But, the rule of the Bridges and Pennekamp Cases is fashioned to serve the needs of all litigation, not merely select types of pending cases."

In Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569, defendant, an elected sheriff of Bibb County, Georgia, was held in contempt of court for expressing his personal ideas on a matter that was presently before the grand jury for its consideration; his ideas were conveyed to and published by the local press. In reversing the conviction and holding that defendant's right of freedom of speech had been abridged, the United States Supreme Court stated, "Our examination of the content of petitioner's statements and the circumstances under which they were published leads us to conclude that they did not present a danger to the administration of justice that

should vitiate his freedom to express his opinions in the manner chosen."

As stated supra, Article I, Section 3, of the Louisiana Constitution of 1921, provides that a person speaking or publishing his sentiments is responsible for an abuse of that liberty. LSA-R.S. 14:47-50 were enacted pursuant to this provision, and they are specifically directed at a defined evil. It is unnecessary for us to consider the issues behind the phrase "Clear and Present Danger." See Beauharnais v. People of the State of Illinois, 343 U.S. 250, 72 S. Ct. 725, 96 L Ed. 919, supra. LSA-R.S. 14:47-50 are an expression of Louisiana legislative will and have to do with the exposing of a person to hatred, contempt, or ridicule so as to deprive him of public confidence or social intercourse. We find nothing in the jurisprudence reviewed supra which prohibits such enactments as are herein under consideration. Also, as stated supra, Louisiana treats defamation and contempt as separate offenses; the jurisprudence we have heretofore reviewed dealt with the offense of contempt. As stated in the Roth and Beauharnais Cases, supra, libel has always been an offense under both common and statutory law. There have been many prosecutions under the libel laws; when the law and the evidence justified it, the person found guilty had a fine or prison sentence imposed on him. Freedom of Speech guaranteed under the Due Process clause of the Fourteenth Amendment has not been extended to those found guilty. See Roth and Beauharnais Cases, supra; State v. Lambert, 188 La. 968, 178 So. 508, supra.

We conclude that LSA-R.S. 14:47-50 are not null and void and are not prohibited by the First Amendment to the United States Constitution, guaranteed to citizens of the States by the Due Process Clause of the Fourteenth Amendment to that Constitution.

Defendant's contention that LSA-R.S. 14:47-50 fail to provide the procedural safeguard of a trial by jury is without merit and will be discussed hereinafter.

In the instant matter, it cannot be gainsaid that the use of the words "racketeer influences" when applied to anyone suggests and imputes that he has been influenced to practice fraud, deceit, trickery, cheating, and dishonesty.[11]

The expression that the judges have enjoyed 300 days vacation out of 19 months suggests and connotes a violation of the "Deadhead" statute, LSA-R.S. 14:138, Public Payroll Fraud.

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[11] racketeer—"* * *a person who obtains money illegally, as by bootlegging, *fraud*, or especially, threats of violence. v.i. to obtain money in any of these ways." (Emphasis ours.)
fraud—"* * *a) deceit; trickery; *cheating*. b) in law, intentional deception to cause a person to give up property or some lawful right. 2. something said or done to deceive; trick; artifice. 3. (Colloq.) a person who deceives or is not what he pretends to be; impostor; *cheat*." (Emphasis ours.)
cheat—"* * *behave *dishonestly* or unfaithfully." (Emphasis ours.)
influence—"* * *2. a) the power of persons or things to affect others, seen only in its effects. b) the action or effect of such power. 3. the power of a person or group to produce effects without the exertion of physical force or authority, based on wealth, social position, ability, etc. 4. a person or thing that has influence."
Webster's New World Dictionary, World Publishing Co., 1957.

Other expressions set out in the Bill of Information connote malfeasance in office. LSA-R.S. 14:134, Art. IX, Sec. 1, La. Const. of 1921.

We conclude that the expressions of the defendant, as set out and charged in the Bill of Information were of a defamatory nature; they are alleged to be defamatory and to have been made maliciously; they were not subject to the protection of the First Amendment to the United States Constitution. All that we are considering in this Bill of Exceptions is the legal sufficiency of the Bill of Information and defendant's Demurrer and Motion to Quash filed to the Information. The questions of malice and proof of demamation will be discussed hereinafter.

Defendant's expressions set out in the Bill of Information are not criticisms of a court trial or of the manner in which any one of the eight judges conducted his court when in session. The expressions charged contain personal attacks upon the integrity and reputation of the judges which warranted trial on the merits.

Bill of Exceptions No. 3 is without merit.

Bill of Exceptions No. 4 was reserved to the denial by the trial judge of defendant's motion for trial by jury, which motion recites in part:

> "That the provisons of Article 7, Section 41 of the Louisiana State Constitution authorizing trial by the judge alone in cases of mis-

demeanor is unconstitutional, null and void in that the said State Constitutional provision is in violation of the Sixth and Fourteenth Amendments of the United States Constitution, depriving petitioner of his right to trial by jury and depriving him of the due process of law.

"That in the alternative defendant alleges that any issue involving the determination of Constitutional rights in general and the right of freedom of speech in particular must be tried by jury under the requirements of the above mentioned United States Constitutional provisions; that the trial of this case will necessarily involve a determination as to certain fundamental Constitutional rights of the defendant and that the trial of this case without jury would serve to deny to defendant due process of law under the Sixth and Fourteenth Amendments of the United States Constitution."

In this Court defendant advances the same contentions as set forth in his motion for trial by jury; he raises the additional argument that the reasoning and holding of the United States Supreme Court in the case of Gideon v. Wainwright, ... U.S. ...., 83 S. Ct. 792, ... L. Ed. 2d ...., decided March 18, 1963, should be applied to the instant bill.

Article VII, Section 41, of the Louisiana Constitution of 1921, provides:

"***All cases in which the punishment may not be at hard labor shall, until otherwise pro-

vided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict." (Emphasis ours.)

LSA-R.S. 15:340 recites:

"Every misdemeanor shall be triable by the judge without the intervention of a jury."

LSA-R.S. 15:341 states:

"A misdemeanor is defined to be an offense, the punishment of which is necessarily a fine or imprisonment in the parish jail or both."[12]

LSA-R.S. 14:47, under which the defendant was charged, provides that, "Whoever commits the crime of defamation shall be fined not more than three thousand dollars, or imprisoned for not more than one year."

Amendment VI to the United States Constitution recites:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

[12] In Green v. United States, 356 U.S. 165, 78 S. Ct. 632, the United States Supreme Court held that Criminal Contempt cases are not subject to jury trial as a matter of constitutional right. Cf. Loyola Law Review, 1961-62, p. 49.

> trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

In State v. Hadad, 142 La. 69, 76 So. 243, this Court has held that the provisions of the Sixth Amendment of the United States Constitution relating to jury trials refer to prosecutions for the violation of federal statutes and not to prosecutions in state courts for violations of state statutes. See, 20 La. L. Rev. 680; Cf. State v. Pailet, 139 La. 697, 71 So. 951. See, also, State v. Harvey, 159 La. 674, 106 So. 28, Cert. denied, 273 U.S. 635, 71 L. Ed. 815, 47 S. Ct. 20.

In State v. Porter, 176 La. 673, 146 So. 465, we have held that parties may waive or renounce what law establishes in their favor, unless expressly or impliedly prohibited by law or public policy. We stated emphatically, however, that, "The law which provides that persons charged with capital offenses or those necessarily punishable by imprisonment at hard labor shall be tried by juries was made in the interest of both the accused parties and the state and neither is permitted to derogate from it. State v. Thompson, 104 La. 167, 28 So. 882; State v. Jackson, 106 La. 189, 30 So. 309." Cf. Patton v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854.

In State v. Livaudais, 161 La. 882, 109 So. 536, we stated:

> "The responsibility resting upon the trial judge, and the latitude of discretion invested in him, in a prosecution for libel is exceptionally great. The penalty is either fine or imprisonment, or both, at the discretion of the judge. Rev. Stat., Sec. 804. In such case, the fine may be as great as $1,000, or as small as the judge deems fit; and the term of imprisonment may be as long as two years, or as short as the judge deems fit. Rev. Stat. Sec. 982. The imprisonment being without hard labor, the case must be tried by the judge, without a jury. Const. art. 7, Sec. 41, p. 50. The defendants in such case have no right of appeal, unless the judge sees fit to impose a fine exceeding $300, or imprisonment for a term exceeding six months, and even then, there is no appeal from the judge's findings of fact on the question of guilt or innocence. Const. art. 7, Sec. 10, par. 7."

In Betts v. Brady, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595, Betts was indicted for *robbery*. He was unable to employ counsel, and he was refused his request for such after informing the trial judge of his indigent position. Without waiving his asserted right to counsel, he pleaded not guilty and elected to be tried without a jury. The judge found him guilty and imposed a sentence of eight years. Betts applied for Habeas Corpus while serving his penitentiary term; the writ was granted, but relief was denied by the

State court. The United States Supreme Court granted Certiorari and affirmed the lower court, stating:

> "The Sixth Amendment of the national Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth. * * *"

In Gideon v. Wainwright, supra, Gideon was charged in a Florida State court with having broken and entered a poolroom with intent to commit a misdemeanor. *This offense is a felony under Forida law.* Gideon was unable to employ counsel, and his request for such was denied by the court. He conducted his own defense and was found guilty by a jury; he was thereafter sentenced to serve five years in the penitentiary. The United States Supreme Court granted Certiorari to review a decision of the Florida Supreme Court on hearing of a Writ of Habeas Corpus to the effect that refusal to appoint counsel for Gideon did not deprive him of his constitutional rights. Betts. Brady, supra, was reviewed; with respect to its holding in that case, the United States Supreme Court stated:

> "We accept Betts v. Brady's assumption, based as it was on our prior cases, that a pro-

vision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights. Ten years before Betts v. Brady, this Court, after full consideration of all the historial data examined in Betts, had unequivocally declared that 'the right to the aid of counsel is of this fundamental character.' Powell v. Alabama, 287 U.S. 45, 68, 53 S. Ct. 55, 63, 77, L. Ed. 158 (1932).

****

"The Court in Betts v. Brady departed from the sound wisdom upon which the Court's holding in Powell v. Alabama rested. Florida, supported by two other States, has asked that Betts v. Brady be left intact. Twenty-two States, as friends of the Court, argue that Betts was 'an anachronism when handed down' and that it should be overruled. We agree."

Since the present defendant was only charged with a *misdemeanor*, and the defendants in the Betts and Gideon Cases were charged with a *felony*, we do not think that the cases are apposite. As stated supra, Article VII, Section 41, of the Louisiana Constitution of 1921, provides that a defendant in a *felony case shall be tried by a jury*. In State v. Porter, supra, we held that trial by jury cannot be waived in certain instances.

We do not think that a comparison can be made between a request for counsel in a felony case and a request for trial by jury in a misdemeanor case. In one instance, there is an indigent defendant who cannot afford to have his defense properly presented asking for counsel to be appointed by the court to represent him; in the other, the defendant objects to trial of a misdemeanor by a skilled trier of facts and law (his responsibility is set out in State v. Livaudais, supra) and asks for trial by jury. We conclude that Gideon v. Wainwright, supra, is not controlling of the instant prosecution; here the defendant neither suffered prejudice nor deprivation of due process of law under the Fourteenth Amendment.

We conclude that the provisions of Article VII, Section 41, of the Louisiana Constitution of 1921, authorizing trial by the judge alone in misdemeanor cases, are constitutional. We find no prohibition against such provisions in the Constitution of the United States or in the decisions of the United States Supreme Court.

Bill of Exceptions No. 4 is without merit.

Bill of Exceptions No. 5 is neither a part of the record nor argued in the State's or defendant's brief. We conclude that it has been abandoned.

Bill of Exceptions No. 7 is not a part of the record; it is not included in the State's brief, and it is only mentioned by number in the defendant's brief. We conclude that it has been abandoned.

Bill of Exceptions Nos. 6, 8, 9, and 11 will be included under one heading because of their similarity of content.

Bill of Exceptions No. 6 was reserved when the trial court permitted the State to ask Arthur Roane (a newspaper reporter for the Times-Picayune, a New Orleans paper, who had previously testified that he was present in the District Attorney's office on the morning of November 2, 1962, and that the defendant had made a statement to him), "Did you make a report of this statement to your paper?" The objection of counsel for the defendant was to the effect that the Bill of Information charges defamation resulting from the publication in the New Orleans States-Item, and that the defendant was not charged with defamation as a result of publication in the Times-Picayune. He contended, "That statement is irrelevant and immaterial that he reported to the Times-Picayune."

The ruling of the trial court with respect to Bill of Exceptions No. 6 recites:

> "* * *The Court rules that solely for the purpose of showing *malice*, this evidence will be admissible and is restricted to the question of showing *malice*. There has been raised in the preliminary motion filed herein the question of a qualified privilege by the Defendant and if the Court finds that it was in fact a question of law, that there is a qualified privilege, then the burden of proof would shift to the Plaintiff—to the State—to show malice—

actual malice, regardless of the truth or falsity of the statement. So for that reason, the evidence is admitted solely for the purpose of showing *malice*. Now, you may answer the question and you may reserve your bill." (Emphasis ours.)

Bill of Exceptions No. 8 was reserved when the trial judge permitted the following testimony of Arthur Roane:

"Q. Did he make a statement to you on November 9?
"A. I suppose he did. He makes statements to me very often.
"Q. Did he make a statement to you that he threatened to take racketeering influences of the Judges to the Grand Jury?

* * *

"Q. What was Mr. Garrison's statement to you?
"A. You are referring to this particular question there?
"Q. The article that you just refreshed your memory on.

(Discussion)

"Q. Did Mr. Garrison make that statement to you?
"A. Yes. I don't know if it was on the particular date preceding this paper but he had said that to me."

In overruling the objection of counsel for the defendant to the above testimony, the trial judge stated, "The statement is admitted for the purpose of showing malice and Courts have held that statements made even after the time are admissible if they are connected with it."

Bill of Exceptions No. 9 was reserved when the trial judge permitted Jack Kneece, a General Assignment Reporter for the Times-Picayune, to testify with respect to his coverage of a meeting of the Press Association in the International Trade Mart Building on Saturday night, January 12, 1963. His testimony is to the effect that the defendant spoke for fifteen to twenty minutes at the meeting, and that part of the speech was directed to the question of racketeering influences on the judges involved.

In admitting the testimony of Kneece, the trial judge stated that he refused to strike the evidence from the record for the reason that "it was found to be introduced under the general ruling that the statement he made with reference to this case was admissible only for the purpose of showing malice, and the evidence is restricted to that and to that alone."

Bill of Exceptions No. 11 was reserved when Robert Kelso, a newspaper reporter for the States-Item, was permitted to testify according to his recollection with respect to parts of a talk given by the defendant on January 11, 1963, at the Monteleone Hotel. Kelso's testimony was with respect to statements made by

the defendant with regard to the eight judges herein involved and was admitted for the purpose of showing malice.

In this Court defendant argues that:

> "The trial judge erred in admitting these other statements of the accused in evidence at this trial on the theory that they were admissible under Article 445-446 of the Code of Criminal Procedure, R.S. 445-446 to show malice on the part of the accused, which the State would have to prove should the court hold that the November 2 statement was privileged. ***These other statements of the accused involved in these bills were also comments upon the conduct of the Judges in respect to public affairs, made by the accused in the reasonable belief of their truth, and hence they also were privileged, and malice could not be inferred from these privileged statements any more than it could be inferred from the November 2 statement. The State had the burden in this proceeding of establishing malice on the part of the accused toward the Judges by positive evidence tending to show that the accused felt hatred and ill will toward the Judges and wanted to hurt them, and that this hatred, ill will and desire to injure on his part was the motivating cause of this November 2 statement. See Clark and Marshall, Crimes, p. 76, Sec. 48 (1952); State v. Lambert, 188 La. 968, 178 So. 508. The State completely failed to offer any evidence of this type; instead, the State's witnesses testified that the accused showed and expressed no hos-

tility toward the Judges, but was actuated by the belief that a public wrong had been committed and that it was his duty to inform the public of this fact. *** The basis of the trial judge's holding that Garrison acted from malice in this matter is that these other statements of the accused reveal malice on his part. * * * Thus, prevented by the statutes and jurisprudence of this state from inferring malice from the November 2 statement, he inferred it from the other privileged statements.

"The trial judge erred in admitting these other statements in evidence, and he doubly erred in using them to impute malice to Garrison. If malice cannot be inferred from one privileged publication, how can it be inferred from three other equally privileged publications?"

In answer to the Application for a Bill of Particulars the State said that it would contend that the statement of the defendant set forth in the Bill of Information constitutes malice in law and also malice in fact.

"Under the express terms of the statute, malice is an ingredient of the crime of libel. Without malice there can be no criminal responsibility. The general rule is, that legal malice, which in law means a wrongful act done intentionally, without just or lawful excuse, is sufficient to support a charge that the publication is libelous. And malice is presumed by the publication. But the rule has its limitations in cases of privileged communica-

tions. State v. Bienvenu, 36 La. Ann. 378. Where the communication is privileged, malice is presumed by law. Berot v. Porte, 144 La. 805, 81 So. 323, 3 A.L.R. 1651. In such communications the privilege can only be destroyed by actual malice, legal malice is not sufficient for the purpose.

* * *

"If the privilege is only qualified the onus lies on the plaintiff in a civil suit or on the State in a criminal prosecution of proving actual malice. This may be done either by extrinsic evidence of personal ill feeling or by intrinsic evidence, such as the exaggerated language, the mode and extent of the publication, and other matters in excess of the privilege. Odgers on Libel and Slander, 2d Ed., p. 438." State v. Lambert, 188 La. 968, 178 So. 508.

"There is much confusion with respect to the use and meaning of the term 'malice' in the law of defamation. In one sense it denotes merely the absence of lawful excuse or privileged occasion; in another it denotes ill will, evil motive, intention to injure, or wanton disregard of the rights of others." 53 C.J.S. Libel and Slander, Sec. 2, p. 35.

"In its popular sense, the term 'malice' means hatred, ill will or hostility to another, but this is not necessarily its meaning in law. In its broadest legal sense, it means the state

of mind of a person, irrespective of his motive, whenever he consciously violates the law. Under this concept every person who is sui juris, and who, without justification or excuse, wilfully does an act which is prohibited and made punishable by law as a crime, acts maliciously. * * *

* * *

"Express and Implied Malice.—Malice is divided into express and implied malice. Express malice * * * is actual malice, or malice in fact, and exists when a person actually contemplates the injury or wrong which he inflicts,—as when a man shoots at another with the intent to kill him.

"Implied malice * * * otherwise called constructive malice, or malice in law, is where the law implies or imputes malice because of the nature of the act done, and irrespective of the actual intent of the party. * * *" Clark and Marshall, Crimes, Sec. 5.05, p. 248.

"Various facts may be considered in determining the existence of malice. Evidence of ill feeling, unfriendly relations, and trouble between accused and the victim of an offense, and evidence concerning the conduct and sayings of the accused shortly before and after the offense was committed, are admissible for such purpose.

" * * * Wharton's Criminal Evidence, Sec. 165, p. 320.

As stated in the above quotations, "malice" is many things. Herein, the defendant pleaded a qualified privilege, and the State, as plaintiff, assumed the burden of proving malice. In offering the present testimony to which objection was raised, the State was not concerned with prior or subsequent defamations; it was merely trying to show by similar statements the malice it had previously alleged with respect to the Bill of Information. In his Per Curiam to Bill of Exceptions No. 8, the trial judge pertinently stated:

> "In an attempt to prove malice it is impossible to probe the heart or mind of the defendant to ascertain whether or not there was malice, hatred, ill will or enmity or a wanton desire to injure, but the best proof of that state of mind is what he says and does with reference thereto, both before and after the defamatory statement is published if it be in connection with the defamation charged."

We agree with the trial judge that intent is involved in malice. In order to show intent, evidence is admissible of similar acts, independent of the act charged as crime in the Information, for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction. L.S.A.-R.S. 15:445.

> " * * * 'Other words than those laid in the petition, and spoken at other times, but within one year before the inception of the suit, may be given in evidence, for the purpose of showing malice in the defendant.'" Kendrick v. Kemp, 6 Mart. (N.S.) 500.

Under Relevancy, in Jones on Evidence, Civil and Criminal, Fifth Edition, Vol. 1, Sec. 159, p. 285, it is well stated:

> "The generally recognized rule is that 'When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved, if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue or is deemed to be relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner.' " See, 53 C.J.S. Libel and Slander, Sec. 214(b), p. 323.

Because the trial judge, the State, and the defense were concerned with malice in the instant prosecution, we find that the trial judge properly admitted the testimony, supra, to which counsel for the defendant objected and made the basis of these bills.

Bills of Exceptions Nos. 6, 8, 9, and 11, are without merit.

Bills of Exceptions Nos. 12, 13, and 14 are not a part of the record, and they are not argued in the State's brief nor in the defendant's brief. We conclude that they have been abandoned.

Bills of Exceptions Nos. 10, 15, 16, and 17 will be discussed jointly; the matters therein involved are similar.

Bill of Exceptions No. 10 was reserved when Malcolm V. O'Hara, Judge, Section "A", Criminal District Court, was asked the following question, "As a result of the statement made by Mr. Garrison that I referred to, have you been affected in any way?" and he responded, "Well, I am going to have to answer that this way: Naturally, being in public office and having held public office for a number of years, I know a number of people, and the impression that I get from the people who discuss this matter with me—it is done in the following ways: People jokingly ask me if it is true that we get all these vacations, whether or not I am a sacred cow, or whether I am influenced by racketeers. It is no one person or nothing specific; it is a cumulative sort of a thing done in a joking sort of manner, but the one thing—my one impression out of the thing, if this is admissible—is that the bench, the criminal bench, seems to be getting the worst of public opinion, that the bench has suffered to some extent as a result of it, but nobody has hit me or threatened me or anything like that."

Objection to the above testimony was predicated on the grounds that it was based on impression and on hearsay. In admitting this testimony the trial court stated that it was "allowing the evidence to stand solely for the purpose of showing whether there was any reaction of the public, without the details of the

reaction, if there was any reaction of the public to the public article such as it would bring it within the intendment and the definition of defamation as set forth in the Revised Statutes, Title 14, Section 47, and restricting it to that. * * *"

Bill of Exceptions No. 15 was reserved when Shirley G. Wimberly, Judge, Section "G", Criminal District Court, was permitted to give the following testimony:

> "Q. Judge, the statement that Mr. Garrison made, has it subjected you to ridicule?
> "A. Yes, it has.
> "Q. Would you tell the Court how?
> "A. Well, I have received many telephone calls of derision."

The objection to the foregoing testimony was based on the ground that it was strictly hearsay. The ruling of the trial court was as follows:

> "The Court rules that the testimony is admissible, that there has been a public reaction by reason of the alleged defamatory statement. There wou'd be no other way of showing that the publication alleged to be defamatory and exposed the person claimed to be defamed to hatred, contempt or ridicule or to deprive him of the benefit of public confidence or social intercourse, as provided in the Revised Statutes, Title 14, Section 47, dealing with defamation and the subsequent articles on the same subject. The Court rules at this time that what was said to the witness would be hearsay evidence but the fact that a statement

> was made to him would not be hearsay evidence if the statement itself is not in evidence, but there is no way to show otherwise that he has been subjected to this injury or to defamation, other than the fact that there was a communication to him showing the public pulse or the public reaction to the statement that was made.***"

Bill of Exceptions No. 16 was reserved when Oliver Paul Schulingkamp, Judge, Section "F", Criminal District Court, was permitted to answer the following question, which he answered affirmatively:

> "Since the publication of this statement by Mr. Garrison about the Judges, have you been subjected to ridicule, embarrassment and so forth as the result of the publications of said article?"

The objection to this question was based on the grounds that it would be purely speculation for the witness to state facts in answer to the question, and that his response would be purely his impression and thus hearsay.

The trial judge's ruling with respect to Bill of Exceptions No. 16 was similar to that given to Bills of Exceptions Nos. 10 and 15.

Bill of Exceptions No. 17 was reserved when Thomas M. Brahney, Jr., Judge, Division "D", Criminal District Court, was permitted to testify as to whether he had been subjected to hatred, contempt, and ridicule as a result of the publication of November 2, 1962.

The objection to the question was based on the ground that the witness would not be in a position to know, except in his own opinion, whether anything that occurred to him after the alleged statement of Mr. Garrison was actually due to the statement. It was contended that the testimony would be irrelevant, immaterial, and not pertinent to the case. The trial judge gave the following ruling with respect to the objection:

"The Court is of the opinion that the evidence is admissible because there is no other way to show that he has been subjected to any hatred, contempt and ridicule and deprived him of the confidence or social intercourse, as stated in the statutory language, as stated in Revised Statutes Title 14, Section 47, within the intentment of that statute. He would be the only one who might or might not know. If he said that he knows that he has been subjected, I think he has a right to testify to that fact as to whether or not he has."

In this Court defendant contends that the trial judge's rulings supra, which he incorporated in his per curiams to the instant bills, were a violation of LSA-R.S. 15:434 which provides that hearsay evidence is admissible, except as otherwise provided in the Code of Criminal Procedure.

We agree with the reasoning of the trial judge to the effect that when a person has been defamed, he has been exposed to hatred, contempt or ridicule

(LSA-R.S. 14:47), and that the person's testimony with respect to such exposure is proof of an essential ingredient of the crime charged—Defamation—and is not hearsay.

We conclude that the testimony of each of the four judges was not hearsay; it was given to prove an ingredient of the offense herein charged and alleged. The trial judge has correctly stated the law in his rulings, and we find no abuse of his discretion.

Bills of Exceptions Nos. 10, 15, 16, and 17, are without merit.

Bill of Exceptions No. 18 was reserved when Joseph I. Giarrusso, Superintendent of the New Orleans Police Department, a witness called on behalf of the State, was permitted to answer the following question:

> "Q. Has the District Attorney called upon you for any more help with reference to the vice investigation?
> "A. No, sir, he has not."

The ground of objection was that the question was misleading and involved matters not herein concerned.

We do not find that the question was misleading. The following statement of the trial judge reflects his reason for admitting the testimony and shows that he committed no abuse of discretion:

> "At this time, the Court will state that it appears that one of the triggering causes of the

giving of the statement on November 2, 1962 by Mr. Garrison to the press, on which this charge of defamation was made, was that this arose by reason of a dispute as to the investigations to be made and the right for the investigation to be paid for by the District Attorney. Throughout the record there have been, without objection, discussions of whether or not the last paragraph—I believe it is the last paragraph of Title 15, Section 571.11 —as to the disposition of fines and forfeitures, concerning the disposition to be made and the right to the use thereof by the District Attorney of Orleans Parish. That has gone on throughout the trial of this case.

"There has been injected into this case, without objection, the question as to whether or not that paragraph of that particular act, which is an amendatory act, is unconstitutional, is violative of the constitutional provisions with reference to the Charter of the City of New Orleans, in which it was the contention of the Judges, and so testified to by them without objection, that they considered it unconstitutional for the reason that the police powers of the City of New Orleans were vested solely in the Police Department under the Home Rule Charter and under the constitutional provisions with reference to the Charter of the City of New Orleans. Therefore, the Court considers that it is very vital to a correct consideration of this as to whether or not this Defendant might or might not have called upon the City of New Orleans for additional help in addition to the police which were assigned

to him, and I believe that there is no dispute that at least 12 policemen of his own choosing were assigned to his office at his request. That is not disputed. Therefore, the Court is of the opinion that it is perfectly permissible to show whether or not the District Attorney at any time called upon the Police Department of the City of New Orleans for additional help.***"

Bill of Exceptions No. 18 is without merit.

Bill of Exceptions No. 19 is neither made a part of the record nor argued in brief. We consider that it has been abandoned.

Bill of Exceptions No. 20 was reserved when the trial judge rejected Proposition of Law No. Eleven. Counsel for the defendant presented the charge to the court before argument in the same fashion as a charge would have been presented had the case been tried by a jury; it recited:

"Publications made in the discharge of a public duty under authority of law are privileged. Burdick, Law of Crime, v 3, p. 166, sec. 795; see Deshotel v Thistlethwaite 240 La. 12, 121 So.2d 222. In this Court counsel for the defendant states:

"Defense counsel objected to the rejection of Proposition of Law No. 11 for the reason that the testimony of all of the complaining witnesses shows that Mr. Garrison's actions in this case arose directly out of his duties as

District Attorney for the Parish of Orleans; that this is factually supported by all of the testimony in the entire record; that he was discharging a public duty when this controversy arose; and further that he has the duty, as a matter of law, to inform the public on the conduct of his office, and if he is thwarted in the operation and conduct of his office, then he has the duty to inform the public why he is being thwarted.***"

Section 795 of the Law of Crime, William L. Burdick, p. 165, recites:

"There are some exceptions to the general common law rule that written and published defamation is criminally libelous even if it is true, since certain occasions are privileged on the ground of public interest and policy. Privileged occasions are either absolute or qualified. They are absolute when the law protects them with absolute immunity from any prosecution, either civil or criminal, although the publication may be knowingly false and with express malice. Absolute privilege is limited, however, to proceedings in which the public service and the administration of justice require absolute freedom of expression, regardless of truth, such as legislative and judicial proceedings, matters involving military affairs, and publications made in the discharge of public duty under authority of law, or made to the heads of departments of the state. The law regards these occasions as absolutely privileged since they are of such public importance that the utmost freedom of expression,

spoken or written, is deemed necessary for those whose duty it is to take part in them, regardless of the possible incidental defamation of any individual."

In Deshotel v. Thistlethwaite, supra, Deshotel, an attorney, brought suit against Thistlethwaite, Editor and Publisher of the Daily World Newspaper, for damages allegedly resulting from defamatory remarks made by Thistlethwaite in a television appearance. Thistlethwaite's defense of truth was found to have no merit. This Court then considered his alternative defense of fair comment and criticism alleged to be enjoyed as a qualified privilege; it held:

"The law relied on here by appellant is incorrectly stated, and the cases cited are for the most part inapposite, as statements made relative to the action of a candidate for public office are not, under Louisiana law, qualifiedly privileged even though false.***

"The cases relied on by counsel for Thistlethwaite in connection with his argument that even false statements about public officials are privileged***are easily distinguishable. They deal with the conditional privilege which shields the statements of one who has a special duty to speak. See Prosser, Law of Torts (2d ed. 1955) pp. 614-617. *To be actionable such statements must have been made maliciously*, with knowledge of their falsity.*** And although it can be argued that appellant's position in the case at bar derives some support from language appearing in our decision in

> Flanagan v Nicholson Publishing Company, 137 La. 588, 68 So. 964, L.R.S. 1917E, 510, this court has pointed out in subsequent decisions that the Nicholson case is only authority for the proposition that Louisiana recognizes the doctrine of qualified privilege respecting fair comment and criticism of public officers and men in public life, but that 'the privilege does not extend to the publication of false statements of fact concerning public officers.' Martin v Markley 202 La. 2?1, 11 So.2d 593, 594; Kennedy v Item Co. 213 La. 347, 34 So.2d 886." (Emphasis ours.)

In rejecting the Proposition of Law, supra, the trial court found that it had no application to the facts of this case and was not a full and correct statement of the law; in its per curiam it stated:

> "***It was further rejected for the reason that it would require an extended qualification, explanation and limitation if it were applicable. Further, the statement was incomplete, and under these circumstances the court was not required to charge this. LSA-R.S. 15:390,[13] and cases thereunder.
>
> "Further, it was rejected as not a complete and correct statement of the complete ruling in the case of Deshotel v Thistlethwaite, cited."

[13] "The prosecution and the defense have each the right to present to the court, before the argument has begun, any written charge or charges, and request that the same be given. Except as otherwise provided herein, the judge must give every such requested charge that is wholly correct and wholly pertinent, unless the matter contained in such charge have been already given, or unless such charge require qualification, limitation or explanation." LSA-R.S. 15:390.

After reading the *Deshotel* case, *supra*, we agree with the finding of the trial judge herein that the Proposition of Law does not contain the complete and correct holding of the case.

It is to be noted that the defendant relied on privilege, and the State contended that the expression of the defendant constituted malice in law and also malice in fact. Malice is presumed where a non-privileged publication or expression is false (LSA-R.S. 14:48); where a qualified privilege exists, malice must be proved (LSA-R.S. 14:49). With respect to the statement from Burdick, supra, the trial judge correctly found:

> "This was a Proposition of law taken out of context of the author and was subject to qualification, explanation and limitation in a consideration of the whole of the article. In the discharge of a public duty under authority of law, or a public officer in informing the public of the conduct of his office, it should be that the publication would be true in the discharge of a public duty, asserting legitimate reasons, rather than a false defamatory statement imputing wrongdoing to another public officer without any facts to justify it.***" See, State v Turner, 228 La. 202, 81 So.2d 861.

The trial judge made the following factual finding:

> "I did not find that the statement made by the defendant was a publication made in the discharge of a public duty altogether, but was a defamatory statement of fact maliciously

made, and not a comment alone upon admitted facts; but he went beyond that and made statements of fact which were false.

"Further, I did not find that this charge was wholly correct and wholly pertinent to the facts in this case. Also, I found that it would require an even more extended qualification, explanation and limitation if it were applicable."

Under his factual finding, the trial judge was correct in rejecting Proposition of Law No. Eleven.

Bill of Exceptions No. 20 is without merit.

Bills of Exceptions Nos. 21, 22, and 23 will be jointly discussed.

Bill of Exceptions No. 21 was reserved when the trial court qualified Proposition of Law No. Thirteen, which had been submitted to it prior to argument; it recites:

"Article 1, Section 3, of the Louisiana Constitution and the First Amendment to the United States Constitution require that persons be given the opportunity to inform the community of both sides of an issue of public interest. The purpose of these constitutional guarantees is to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any

person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. Cooley's 2 Constitutional Limitations (8th ed. 1927) 885; Wood v Georgia, 370 U.S. 375."

The trial court qualified Proposition of Law No. Thirteen by pointing out that Article I, Section 3, of the Louisiana Constitution of 1921, was not a part of the holding in the case of Wood v. Georgia, supra. This section provides that a person is responsible for the abuse of liberty of speech or of the press.

In this Court defendant avers in brief:

"The accused, through his counsel, excepted on the ground that Wood v Georgia dealt with freedom of speech, and it is immaterial whether freedom of speech is challenged through the medium of contempt proceedings or criminal defamation proceedings—if freedom of speech protects an individual, it protects him against all challenges.***"

Bill of Exceptions No. 22 was reserved when the trial court rejected Proposition of Law No. Fourteen, which recites:

"The role that elected officials play in our society makes it imperative that they be allowed freely to express themselves on matters of current public importance. The First Amendment to the United States Constitution affords an absolute privilege to an elected official

who expresses himself on such matters. Wood v Georgia, 370 U.S. 375."

The trial judge rejected the Proposition, because he "did not find that the Constitution of the United States or the Constitution of the State of Louisiana grants an absolute privilege to make any statement, particularly a false defamatory or derogatory statement, simply because a person is an elected official, in commenting on matters of public importance, and in so doing, make unsubstantiated and false statements of fact regarding other persons, rather than commenting upon admitted facts, and the party defamed would have no legal remedy."

In this Court defendant avers:

"Defense counsel excepted to this rejection, pointing out that Article 1, Section 3, of the Louisiana Constitution cannot bar the accused's rights under the First Amendment to the United States Constitution, and further that the record in this case disclosed that Mr. Garrison was an elected official with a duty to the people of the Parish of Orleans, and that thus Proposition of Law No. 14 is pertinent in this case.***"

Bill of Exceptions No. 23 was reserved when the trial court rejected Proposition of Law No. Sixteen which recites:

"Men are entitled to speak as they please on matters vital to them; errors in judgment or unsubstantiated opinions may be exposed,

but not through punishment for the expression. Under our system of government, counter-argument and education are the weapons available to expose these matters, not abridgment of the right of free speech. Wood v. Georgia, 370 U.S. 375."

After differentiating the instant prosecution from Wood v. Georgia, supra, the trial court found:

"It goes without saying that principles of law are applied to the facts in the case, and I did not find this wholly correct or wholly pertinent to the facts in this case; particularly that it was a partial statement taken out of context on an entirely different factual situation."

Defendant avers in this Court:

"Through counsel, the accused objected, stating that if the cloak of freedom of speech is present, it protects the accused in this case from all challenges to that freedom, including charges of criminal defamation, and that the rights guaranteed to the accused by the United States Constitution cannot be abridged by the law, jurisprudence, or Constitution of the State of Louisiana. * * * "

We find no merit in Bills of Exceptions Nos. 21, 22, and 23. Our reasons for such finding are set forth in our lengthy discussion of Bill of Exceptions No. 3, which in part pertained to similar matters. The trial judge was correct in his rulings; his reasoning in dis-

tinguishing Wood v. Georgia, supra, from the instant prosecution in his per curiams to the instant bills is very similar to that of this Court in Bill of Exceptions No. 3. He did not abuse his discretion nor commit error with respect to the provisions of LSA-R.S. 15:390, supra.

Bills of Exceptions Nos. 21, 22 and 23, are without merit.

Bill of Exceptions No. 24 was reserved when the trial court qualified Proposition of Law No. Seventeen, which recited:

> "Actual malice cannot be inferred from any qualifiedly privileged statement. It must be proven by extrinsic evidence of hatred, ill will or wanton desire to injure on the part of the accused."

The trial judge qualified the Proposition by the following statement from State v. Lambert, 188 La. 968, 178 So. 508:

> "If the privilege is only qualified the onus lies on the plaintiff in a civil suit or on the State in a criminal prosecution of proving actual malice. This may be done either by extrinsic evidence of personal ill feeling or by intrinsic evidence, such as the exaggerated language, the mode and extent of the publication, and other matters in excess of the privilege. Odgers on Libel and Slander, 2d Ed., p. 438."

In his per curiam to the instant bill, the trial judge sets forth, as follows, his further reasons for qualifying the Proposition:

> "My reason for qualifying it was that my impression was that it sought to restrict the proof of actual malice to extrinsic evidence only, of hatred, ill will or wanton desire to injure on the part of the accused.
>
> "Actual malice is susceptible to other definitions also and could be proven by extrinsic evidence under these definitions, and the State is not restricted in proving actual malice by any other legal means.
>
> "It was also qualified by the provisions of LSA-R.S. 14:49, which provides that the State must prove actual malice, whether the statement is true or false, under the provisions of said article.
>
> "Counsel for defendant * * * made the statement as to how he appreciated the ruling in that the effect was that the State must prove malice in cases only involving qualified privilege. I do not see how this appreciation was arrived at as I was discussing nothing more than the law of actual malice and a qualifiedly privileged statement as requested by counsel.
>
> "Counsel has in this bill of exception set up an additional explanation after ruling, stating his reasons therefor the proof of malice in all

cases. This question could not be raised after the requested charge was given because there was no request made of the Court for a charge as to the law on a non-qualifiedly privileged statement or legal malice. Therefore, counsel has set up in this bill of exception the question of legal malice where there is no qualified privileged statement, which was not requested of the court in the charge; and, of course, this additional reason asserted after the court has ruled on the proposition of law submitted does not make it a proposition of law or a charge that should have been passed upon and should form no part of the bill of exception. It is a recognized principle of law that a judge is presumed to know the law and does not have to charge himself on any question of law not requested in a misdemeanor case tried by the judge alone.

"The requested charge was granted but was qualified for the reason that it was not a complete statement of law of proof of actual malice and was not a wholly correct statement of the law as applied to the facts in this case."

In the present bill of exceptions, counsel for the defendant avers that he objected to the rulings of the trial judge for the reason "that the State must prove malice in all cases of criminal defamation, whether a qualified privilege exists or not; that in cases of qualified privilege the State must prove actual malice; in cases where the qualified privilege does not exist, the

State must prove legal malice. The State must carry the burden of proof of malice in all cases of criminal defamation."

In this Court, counsel for the defendant sets forth in brief:

> "The basis of the defense's exception here is that the State must prove malice in all cases of criminal defamation, not just in cases involving a qualified privilege. * * * In cases of qualified privilege the State must prove actual malice; in cases where the qualified privilege does not exist, the State must prove legal malice. The State must carry the burden of proof of malice in all defamation cases, not just in those defamation cases in which the defendant has a privilege.
>
> "The above, and the trial judge's per curiam to this bill, * * * are good examples of the confusion which existed in the trial judge's mind about what the State had to do in this case to prove malice. As we have already stressed in this brief, the State introduced no evidence to show hatred, ill will or a wanton desire to injure the Judges on the part of the accused. What the State did introduce in evidence at the trial, over the objection of defense counsel, were several other privileged statements of the accused, also made, like the November 2 statements, in a reasonable belief of their truth and without malice. As he tells us in his Reasons for Judgment in this matter, the trial judge bases his holding of malice on

> Garrison's part on these other privileged statements. According to the trial judge, these other privileged statements 'show the state of mind that the Defendant had on and from the date of the original defamation up to and including the date the last one was issued and convince me that it was a steadfast position of ill will and enmity arising out of a dislike of the fact that the Judges refused to sign certain motions for him."

As stated throughout this opinion, the defendant pleaded "Qualified privilege", and the State contended that the statement of the defendant constituted malice in law and malice in fact. LSA-R.S. 14:49 provides that actual malice must be proved where a qualified privilege exists under certain enumerated circumstances; the statute does not restrict the proof of malice to extrinsic evidence. We find no prohibition in the law or in the jurisprudence which forbids the use of intrinsic evidence in a prosecution such as the instant one; neither do we find a limitation or restriction. The trial judge was therefore correct in qualifying Proposition of Law No. Seventeen. (See our discussion of Bill of Exceptions No. 6, 8, 9, and 11, supra.) Cf Miller Smith and Champagne v. Capital City Press, 142 So. 2d 462; Jenkins v. D X Sunray Oil Co., 297 F. 2d 244.

The trial judge was correct in stating that after he had given his ruling to Proposition of Law No. Seventeen, he could not be compelled to expand to matters not requested in the Proposition—the proof required in *all* cases of defamation.

Bill of Exceptions No. 24 is without merit.

Bill of Exceptions No. 25 was reserved to the ruling of the trial judge in denying defendant's Motion for a New Trial.

The Motion reurges all of the objections previously raised in Bills of Exceptions Nos. 1 through 24, and with respect to these matters nothing new is presented for our consideration. We have answered the arguments in discussing the bills, all of which we have found to be without merit.

The Motion avers that there is no evidence in the record to support the judgment of the trial court. We have read the transcript of testimony (consisting of 741 pages), as well as the numerous pleadings hereinbefore discussed; we have also read the defendant's brief (94 pages) and the State's brief (43 pages), and we find that there is evidence to support the judgment. Where there is some evidence to sustain the conviction, this Court cannot pass upon the sufficiency thereof. State v. Copling, 242 La. 199, 135 So. 2d 271; State v. McDonell, 208 La. 602, 23 So. 2d 230. We are constrained to remark here that the length of this opinion is due to the extensiveness of the pleadings and the voluminous record attached; we are also impelled to state that the learned trial judge and able counsel for both the State and the defendant have treated the matter with dexterity and completeness.

Counsel for the defendant argues in brief that there is not one scintilla of evidence to indicate that the ac-

cused made the statement herein involved without a reasonable belief of its truth. This contention would have to do with malice, which we have covered in our discussion of Bills of Exceptions Nos. 6, 8, 9, 11 and 24.[14] Cf. State vs. Bienvenu, 36 La. Ann. 378.

Bill of Exceptions No. 25 is without merit.

Bill of Exceptions No. 26 was reserved when the trial court denied defendant's Motion in Arrest of Judgment.

The Motion averred "that the entire proceedings against the defendant are null and void for the reasons that the statutes under which the bill of information is laid is unconstitutional and null and void and in violation of the First Amendment of the United States Constitution as a restriction on the freedom of speech."

We find no merit in the instant bill. In our disposition of Bill of Exceptions No. 3, we found LSA-R.S. 14:47-50

[14] It is appropriate to here observe that if defendant believed the statements he made, he could have pursued the following legal channels open to him:
(1) Legal proceedings to compel the judges to sign the order.
(2) Charging the judges with a violation of the "Deadhead" statute. LSA-R.S. 14:138.
(3) Conducting an open hearing under the provisions of LSA-R.S. 15:17.1 concerning the alleged actions of the judges and whether or not there was a question of racketeer influences on the eight judges.
(4) Institution of removal from office proceedings under the provisions of Art. IX, Secs. 1 and 5, La. Const. of 1921.
(5) Availing himself of the services of the Judicial Council of the Supreme Court of Louisiana as provided by its Rule XX. Sec. 6. West's LSA, Vol. 8, Supplement for use during 1963.
The record reflects that defendant did not avail himself of the foregoing legal channels.

constitutional and not violative of the First Amendment to the United States Constitution.

Bill of Exceptions No. 26 is without merit.

For the reasons assigned, the conviction and sentence are affirmed.

HAMITER, J. concurs in the result.

Opinion of the Criminal District Court

As was generally known, I have been called upon to try and decide this case under appointment by the Supreme Court of the State of Louisiana. As I stated when I first appeared in this case, I am not here of my own volition, but rather as a duty, to hear and decide the issues of this case under my oath of office as a District Judge of the State of Louisiana. I am sure that there is no one that would envy me my position in this matter. As I stated at the beginning of this trial that I would try this case as expeditiously and as judiciously as possible and would seek to arrive at a fair, just, and impartial verdict. I have heard the evidence in this case, and since the trial I have had occasion to read the evidence carefully. I have devoted many hours of study to the legal principles that are involved in connection with the evidence, have heard the oral arguments, and am now ready to render a decision in the matter, which I believe to be the only decision that I could conscientiously reach, giving a thorough consideration to the evidence adduced from the witness stand, or want of evidence and the legal principles involved. That

is my duty under the law, to so decide fairly and impartially from this standpoint, and from this alone, disregarding all else.

In a consideration of this case, it will be my duty to treat it as any other case, regardless of the parties or the issues involved. In so doing, it becomes necessary for me to make comments upon certain facts and certain principles of law, and I would like for it to be understood that in so doing I am making those statements impersonally and dispassionately, without any intention of doing any injury to any of the witnesses or the Defendant.

In discussing the facts and the application of the law, the Court must necessarily give its interpretation of its appreciation of the facts and the law. Therefore, I trust that anything that I may say will be taken in that light, and not as a criticism of any of the witnesses, who may have appeared in this case, or of officials or of the Defendant.

It will be my purpose at this time to give my impression of the highlights of the testimony that would be material, relevant, and would assist the Court in the correct determination of the issues involved.

There is in the record the testimony of several reporters for the New Orleans newspapers, TV stations, and so forth, who testified in this case, particularly with reference to what was said by the Defendant herein at the time of the making of the statement

which the State alleges is defamatory. Also in the record is the testimony of several reporters as to what was said subsequent thereto as well as other statements made on November 2, 1962, which was the day on which the alleged defamatory statement was given to the press. Most of what was said would not be material in the determination of the issues, but some of it is material to determine the state of mind of the Defendant at that time and the question of actual malice.

On the date of the alleged defamatory statement, Mr. Garrison came into the courthouse, as I appreciate it, with Pershing Gervais, and learned that there had been an en banc meeting of the Judges. He was interrogated by Mr. Bert Hyde, reporter, as to whether or not he desired to make a statement, and later on, in the presence of Mr. Gervais and others, he issued the statement which the State alleges to be defamatory. Also, in a statement to Mr. R. J. Dempsey of the New Orleans States-Item, the Defendant made the statement that he was going to bring these racketeering influences on the Judges before the Grand Jury. However, this was never done, according to the evidence.

Also on the same date of November 2, 1962, on which the alleged defamatory statement was made, Mr. Bill Reed, News Director for WWL-TV, I believe, interviewed Mr. Garrison—on the date of the alleged defamatory statement as well as on other dates—and the statement was made by the Defendant to Mr. Reed and subsequently made public. Mr. Reed testified,

when questioned about the responsibility of fixing cases for trial, that Mr. Garrison made the statement, "To be charitable, I would call it a lie," referring to the Judges fixing the responsibility on him. Further on that date when it was called to his attention that the Judges had pointed out that they thought it would have been much better had Mr. Garrison met with them, his reply was, "They know, I believe, perfectly well it would have been a waste of time, that the only way to get these sacred cows back to work is by public reaction." Also, when questioned about the number of days vacation per year taken by the Judges, Defendant referred to it in the following language: "The only way to refer to it is as a racket," and that the only way the public would find out about it was for him to bring it to public notice. He further testified that he did not notice anything antagonistic by the Defendant, but that the Defendant at that time did not appear to be calm. Of course, the alleged defamatory statement is in the record, that was given to the press, and there is no reason to comment upon it until later in this opinion. It is not denied that it was given and published and given wide circulation.

It might also be noticed here that some of the statements made at different times were objected to by the Defendant for the reason that they were not admissible. They were admitted by the Court for, and restricted to, the purpose of showing actual malice. However, there was admitted into the record, by agreement of Counsel, and so stipulated a copy of a speech made by the Defendant at the St. Anthony Auditorium in

New Orleans on December 5, 1962. This speech was taken verbatim by Mrs. Theresa E. Shean, an official court reporter, and at the request of Counsel for the Defendant, it was read into the record.

In this speech, Mr. Garrison defends his position under the doctrine and right of freedom of speech. He points out the crowded conditions of the Parish Prison, that the Judges were derelict in taking too many holidays, or words to that effect. He makes the following statement:

> "I will be standing up and telling the people of New Orleans every time I encounter trouble like this from a public official. I have to because I have no organization to turn to. I have no allies because the other officials are the 'association of armed robbers.'"

He also referred to the expenditure of funds, which will be hereinafter discussed in connection with the discussion of the law and the provisions of LSA-R.S. 15:571.11.

There were other parties and reporters who testified in this case, but I can see that no useful purpose could be served in exhaustively reviewing this line of testimony further.

As a matter of testimony, there is the evidence in the record of the eight Criminal District Court Judges alleged to have been defamed, as well as the testimony of Judge William J. O'Hara, retired.

The record herein is voluminous, and it would not be feasible or expedient to try to explain everything that each witness might have said. Rather it will be treated as a whole.

It will be my purpose at this time to comment only as to the highlights of the testimony of each of the Judges of the Criminal District Court, who testified in this case, in the order of their appearance on the witness stand.

Judge Malcolm V. O'Hara testified that the statements made in the alleged defamatory article were not true, that he had never told the District Attorney how to run his office or sent him any messages. He also testified that the District Attorney handles the setting of cases. Testifying further, he says that the alleged defamatory statement had subjected him to cumulated ridicule. He did not blame the crowded conditions of the Parish Prison on the Court, as a fault of the Court or of the District Attorney, testifying that the building housing the prisoners was built 35 years ago for a certain number of people, and population-wise it was now causing the crowded conditions. He further testified that a large majority of the people of New Orleans wanted vice cleaned up and that there were very few holding contrary views. He also testified that he took office in September and had jury cases in November and December of 1962 and in January of 1963, and disposed of 150 cases. He further testified that he supported Mr. Garrison for the office of District Attorney, which he now holds.

The next witness on the stand was Judge William J. O'Hara, now retired after serving as Judge of the Criminal District Court for approximately 30 years. As I appreciate his evidence, the difficulty that triggered the differences between the District Attorney and the Judges arose by reason of an application of the District Attorney for approval of a bill for something like $985.00 for drapes and carpets for the District Attorney's office. Judge O'Hara asked for proof of the value of the expenditures requested in the motion by the District Attorney, which he says Mr. Garrison agreed to get for him. This was never furnished. Judge O'Hara went on vacation, and when he returned, he understood that Judge Wimberly had signed the motion. I gather from the evidence that, although Judge O'Hara had never promised to sign the order, that the District Attorney represented to Judge Wimberly that he had done so, and when Judge O'Hara returned from vacation, Judge Wimberly had signed the order. It was then that the Judges invoked a rule at an en banc session to require that all motions for expenditures out of the Fines and Forfeitures must be signed by five out of the eight judges, three on emergency matters. He further testified that he knows of no racketeering influence on him and that no messages or directives were ever sent to the District Attorney by him on how to run his office; that there was no use of vacations as a racket, and that he strongly stands for the suppression of vice in New Orleans. Further his testimony is to the effect that the crowded condition of the docket was due to the inadequacy of the District Attorney's office. I do not believe the im-

port of this casts any reflection on the Defendant herein, for the reason that Judge O'Hara's testimony led me to believe that he intended to say that the system employed resulted in the backlog of cases, rather than who was the District Attorney, citing the fact that during the administration of Mr. Hubert as District Attorney, there was a different system used in processing the cases when they first came into the office and later, which resulted in a clean-up of the docket. However, Mr. Hubert's successor had resorted to the old system, which is still used by the Defendant, and this resulted in the backlog of cases. Judge O'Hara also testified that the statement of the District Attorney with reference to racketeering influences was also false.

It might be further noted that Judge O'Hara was very complimentary to the Defendant as District Attorney as to the clean-up on vice, saying, "Now, I am not saying that Mr. Garrison did not do a very good job on Bourbon Street. He did a very good job . . ." However, he disagreed with the authority of the Defendant to pursue the investigation in the manner he was using, as being in conflict with the provisions of Section 16 of Act 301 of the Legislature of 1946, providing for police powers in the City of New Orleans. He further testified that if there was any segment of the population of New Orleans in favor of B-drinking and prostitution and so forth, it was only an insignificant fraction, and that this segment had never made any effort to pressure the judges.

The next witness for the State was Judge Shirley Wimberly, who testified that the statement published on November 2, 1962, by Mr. Garrison, which is the alleged defamatory statement, was not true; that he had never sent the District Attorney any statements or directives on how to run his office and he was never influenced by racketeering influences. He further testified that he signed the disputed motion for the Defendant with assurance from the Defendant that Judge O'Hara had agreed to it. Later he learned that he, Judge O'Hara, did not, and Defendant admitted that to the Judges in the en banc session.

I will interpolate here that Judge O'Hara might have agreed to sign it in reference to, qualified to, the supporting vouchers and so forth, but would not sign it without it.

This led to the invoking of the so-called five-out-of-eight rule, which meant that five of the eight Judges of the Criminal District Court would have to sign any motion for approval of funds for Defendant Garrison, three on the question of emergencies. He also questioned the validity of the investigations in the manner performed as being contrary to the provisions of Section 16, Act 301 of 1946, as to the police powers of the City of New Orleans. His testimony also sets forth that from May 7 to September 10 there were approved for the Defendant some 73 motions, totalling $19,284.56 in expenditures. On October 26, 1962, the Judges approved 80 items, totalling $10,276.32, and since October 26, 1962, the Judges have approved 32 motions

amounting to $17,742.35, making a total amount of claims approved since May 7, 1962, of $47,303.23 for expenditures out of the funds for Fines and Forfeitures. I believe there was a claim—I don't remember exactly how much it was but it was somewhere in the neighborhood of $1,500.00—for undercover work that has not been approved, as he considered that Act 301 of 1946 prohibits anyone except the City Police of the City of New Orleans from exercising police powers within the City, and for other reasons. He further showed that in the items that were approved for Defendant Garrison, that the District Attorney's Office had purchased 12 chairs for the sum of $100.00 each, that he had purchased a microscope for $689.59, a camera for $157.00, two flags for $92.48, two plastic plants for $233.30, carpet for $231.75, a sofa for $199.00, and an overstuffed chair for $100.00.

The next witness called by the State was Judge Oliver P. Schulingkamp. The highlights of Judge Schulingkamp's testimony are that the alleged defamatory article of November 2, 1962, by Mr. Garrison, was not true; that he was never under the influence of any racketeering influences and never sent any messages to the Defendant on how to conduct his office. He further testified that the District Attorney sets the docket in different sections of the Court and that no complaints were made by the District Attorney about the assignment of cases. He further testified that it was his opinion that under the provisions of Act 301 of 1946, it is the law that only the Police could exercise police powers in New Orleans.

The next witness called by the State was Judge Edward A. Haggerty, Jr., who was one of the judges of the Criminal District Court. My appreciation of his testimony was that the alleged defamatory statement of November 2, 1962, by the Defendant was false; that he had never been influenced by racketeers and had never sent any messages or directives to the District Attorney on how to operate his office; further that the cases are assigned by the District Attorney for trial; further that in the campaign in which the Defendant, Mr. Garrison, had defeated Mr. Dowling for District Attorney, Mr. Garrison in his campaign speeches had particularly raised the question about the use of the funds authorized under the statute by the Dowling Administration, and that this was one of the main issues in the Dowling campaign. Further his testimony is that this raised a so-called red flag to the Judges and caused them to examine and consider the expenditures more carefully. Further his testimony is that he did not believe the statute authorizing the use of the funds in the manner used by the Defendant was constitutional and questioned the authority of the District Attorney to exercise police powers in the City of New Orleans in conflict with Act of the Legislature 301, 1946. He admitted that he had attended the party at which Mike Callia, who had been convicted of a crime, was host, but that, as Assistant District Attorney, he was the one who had prosecuted Mike Callia and that Judge Cocke was the one who had sentenced him to one year in the Parish Prison. His testimony further reveals that he voted for the Defendant for District Attorney, for the office which he now holds.

I might digress and say here that it is not the purpose of the law particularly to unduly punish a person as a criminal or to seek revenge for any infraction of the laws, but rather that the laws should be used as a deterrent to the party punished and others. The purpose of our laws is rather to seek to rehabilitate one who has paid his debt to society and seek to restore him to a responsible position of citizenship. It is not the American way of life to look down upon one who has been convicted of a minor crime, or, to use an ordinary expression, to kick him when he is down, but rather to seek to extend to him a helping hand when seeking to restore him to his rightful place in society. I am sure that we all have friends who have made errors in their way of life and might have been convicted of a minor crime.

The next witness called by the State was Judge Bernard J. Bagert, who testified that the jury trial days that were requested by the Defendant in his section were on Monday, Wednesday, and Thursday; further, that the statements made by the Defendant in the alleged defamatory statement on November 2, 1962, were untrue and false; that he worked practically every day, that he was not influenced by any racketeers, and that he never told the District Attorney how to run his office or sent him any message on it; further, that he had done nothing to block or restrict the District Attorney in his efforts to suppress vice. He was further of the opinion that the statute on fines and forfeitures is unconstitutional and in conflict with Act 301 of 1946. However, he said that he would sign

investigative warrants until the act was declared unconstitutional.

The next witness called by the State was Judge George P. Platt. Judge Platt testified that he was elected Judge of the City Court in 1920, in which capacity he served until 1936, when he was elected Judge of the Criminal District Court, and that he has served continuously as such since that time. He testified that the alleged defamatory statement of November 2, 1962, by Mr. Garrison was absolutely false, that he had never been influenced by racketeers.

Judge Platt presented to the Court at the conclusion of his testimony a silver scroll that was presented to him on January 28, 1954, by the New Orleans Bar Association, which stated:

> "Presented to the Honorable George P. Platt in recognition of distinguished and loyal service on the bench, by the New Orleans Bar Association."

The next witness called by the State was Judge Thomas M. Brahney, Jr., who testified that the alleged defamatory statement made by the Defendant on November 2, 1962, as published, was false; that he had never been influenced by racketeers; that he was not in favor of racketeers and never attempted to block any effort to suppress vice; that he was also of the opinion that the Act of 1960, which took the money from the General Fund of the City of New Orleans and put

it into the funds of the District Attorney, was a violation of the Home Rule Charter.

The next witness called by the State was Judge J. Bernard Cocke, who testified that the alleged defamatory statement made by the Defendant on November 2, 1962, was false; that he had never been influenced by racketeers, nor was he sympathetic towards them; that he had never sent any messages to the District Attorney on how to run his office and had never sought to block the investigations; that although the law required only three jury terms per year, during his 18 years of service he had had eight jury terms a year; that he contributed to the campaign of Mr. Garrison and worked for him, but that he had lost confidence in him when he employed Mr. Pershing Gervais as an investigator, whom he branded a thief, a grafter, a professional informer and an habitue of the places in the Quarter which he denounced. Under cross-examination, Judge Cocke admitted that in previous political campaigns very serious accusations had been made against him, which accused him of various and sundry acts of dishonorable conduct, but he had won his election by an overwhelming majority, proving that the people of New Orleans did not believe these accusations.

The next witness introduced by the State was Joseph I. Giarrusso, who is Superintendent of the New Orleans Police Department. He testified that 12 policemen had been assigned to the office of the District Attorney to work out of uniform; that the District

Attorney selected these men, who were paid by the City, and that they were good men; that the District Attorney had not had a meeting with the other police officers of the City of New Orleans.

This has been a tedious summation of my appreciation and deduction of the highlights of the testimony of some of the respective witnesses on behalf of the State on matters that I consider pertinent.

Further adding to the testimony, it will be noted that all of the judges that were questioned about it, testified that the alleged defamatory statement by the Defendant in November, 1962, had subjected them to contempt, hatred, and ridicule, and, in addition to the above, the Judges were forcefully and searchingly questioned by Counsel for the Defendant on cross-examination as to any connections that they might have with parties who had previously been tried for violation of the law, particularly with reference to releases on parole prior to making bond. Most, if not all, of the Judges admitted that they had paroled certain persons charged with crimes under the provisions of LSA-R.S., Title 15, Section 78, which they had a right to do. I believe from the evidence that in many of the cases the paroles were granted to respectable lawyers, who had guaranteed the appearance of those charged with a crime, in court for the purpose of making bond or trial, and to others whom the Judges in their judgment felt would be responsible persons even though the proof indicates that some of them have been convicted of crimes before.

Although there have been many witnesses summoned on behalf of the Defense, none of them were called to refute this evidence or prove the truth of the accusations made in the alleged defamatory statement. Article 19, Section 9, of the Constitution of the State of Louisiana provides that in all proceedings or indictments for libel, the truth thereof may be given in evidence. Therefore, the only evidence before this Court that was adduced from the witness stand is that introduced by the State, the highlights of which have been heretofore reflected.

As I appreciate and deduce from the evidence of this case, the Defendant in his campaign for District Attorney against Mr. Dowling had raised the issue of illegal use or misuse or extravagant use of funds. It appears from the evidence that the Judges, during Mr. Dowling's regime and previously, had not questioned these expenditures of the District Attorney very closely.

On cross-examination, Counsel for the Defendant in this case introduced several items which appeared to be rather expensive and extravagant expenditures during the previous administration. That was a matter within the discretion of the judges who signed the motion. It is not for me to comment on this action as the circumstances surrounding those are not before me. However, the dispute as to these expenditures during the Defendant's administration arose by reason of the fact that some of the Judges considered them as extravagant and excessive amounts being expended

without supporting proof. This matter finally came to a head by one item which the Defendant had sought to have approved by a motion, which I believe was drapes and carpets for his office. This expenditure was sought under the provisions of L.S.A.-R.S. 15:571.11, which provides as follows:

> "That all fines and forfeitures imposed in criminal cases—

this is a portion that applies to the Defendant in this case—

> "* * * * all fines and forfeitures imposed in criminal cases and prosecution by the Courts of Orleans Parish shall, upon collection, be paid to the District Attorney of Orleans Parish, who shall deposit same in a special account to be used in defraying the expenses of the Criminal Courts of the Parish, extradition, and such other expenses pertaining to the operation of the Criminal Courts of Orleans Parish and the office of the District Attorney of Orleans Parish as in his discretion may be necessary. Provided that any surplus remaining in said special account or fund on December 31 of each and every year shall be distributed as follows: One-half to be retained by the District Attorney of Orleans Parish to be used as hereinabove set forth, and the other half to be remitted to the City of New Orleans. No money shall be paid out of this fund except upon motion by the District Attorney of Orleans Parish and approval by a judge of the Criminal District Court of Orleans Parish. A copy of said

> motion must be served on the budget officer of the City of New Orleans 24 hours prior to approval thereof by the Judge. Said fund shall be annually audited by the Director of Finance of the City of New Orleans. * * *"

And then it recites the amendatory acts.

It will be seen by reading the provisions of this law that it pertains to the operation of the criminal courts and the office of the District Attorney of Orleans Parish, and it provides for the expenditure of funds for the operation of the criminal courts of Orleans Parish and the office of the District Attorney of Orleans Parish which, in his discretion, may be necessary. However, since the Judges of the Court have been approving these items, I do not see that I should comment on it, for the reason that it addresses itself to their discretion and their interpretation. The Act, however, provides that the motion should be approved by a judge of the Criminal District Court of Orleans Parish. Therefore, I believe the intendment of the Legislature in this matter was that a check be placed on the spending of this fund by requiring this to be done just as ordinary business vouchers or any other instrument might have to be signed by one person but is necessary to be countersigned by another to be valid. I can see that the Judges might have been provoked when the dispute arose in reference to the signing of the order which precipitated the controversy and the five-out-of-eight rule was adopted and invoked. However, I can also see that the District Attorney

could be provoked by the establishment of such a rule as the statute did not require five of the Judges to sign the order, although they might agree that no one judge would sign the motion unless five did so. This could have provoked the Defendant such as would give rise to a thought in his mind that he was being discriminated against. In other words, I can also imagine a situation where there might be four of the judges who would agree to—off the cuff agree to sign a motion and there would be four who would disapprove. Therefore, this would lead to a state where the District Attorney could not get his motion approved, although there might be four judges who would be willing to approve it. I do not believe that the Legislature contemplated this. It would also place an additional burden and hardship on him in having to go to five different judges to get the signatures whereas the Act only provides that it is necessary to have the signature of one judge. However, this would be subject to the discretion of the judge in approving the motion, and if, in fact, the District Attorney might have been provoked by this action, a relief in law was available to him to apply for a writ of mandamus by appropriate proceedings in a proper court. This remedy, in my opinion, the District Attorney should have resorted to. I am satisfied that he could have settled the matter in a proper manner in the proper courts of this state. As a matter of obervation. I will say that it is inadvisable at any time to make any statement if one is disturbed or excited or in anger or disappointed or under provocation. The Defendant should have resorted to the law, to the relief that the law granted him, and the matter

would have been settled long before this one way or the other without the necessity of this trial. Also, if he reasonably and honestly believed that the Judges were in fact influenced by racketeers or were subject to racketeering influences or guilty of any misconduct, there were several remedies under the law that were available to him to rectify this.

While on this question of expenditure of these funds and the construction of this statute, in the speech delivered on December 5, 1962, by the Defendant at St. Anthony's Auditorium, he made the statement about the fund from which he was expending, about the money that was secured from the fines and forfeitures, saying:

> "In that regard, this is not tax money. We have reduced our budget from the City voluntarily. We sent money back to the City. Fines and fees come from the bonding companies and this is what we have improved our office with. Secondly, this money *has to be spent* by December 31st, or we have to give some of it to the City. So we have gotten $60,000.00 and I conclude that this is the time to get the equipment that we need, and that's what we have been doing. So, if you hear anybody say that we are throwing money away, this is not true. This *has to be spent*. The law encourages the District Attorney to spend it so it won't be built up. We have about $40,000.00 and what we don't spend, will have to be given away. It's a practical matter. And my hands are still tied."

It is hard to envision the logic of this line of argument for the reason that one-half of the funds that would have been left at the end of the year would have gone to the City to be used for the benefit of the citizenry of New Orleans, and, as I view it, the statute was only to provide the District Attorney with funds necessary for the operation of his office officially.

As far as there is any evidence whatever before the Court, all of the Judges of the Criminal District Court when asked, who appeared in this case, have emphatically stated that the alleged defamatory statements were not true. All of them testified emphatically when asked that they had not been influenced in any respect by racketeers. All of them testified when asked that they had been subjected to hatred, contempt, and ridicule because of the statement.

The evidence does not convince me that the Judges were vacation-minded or that they were not willing to work during the time that they were supposed to under the law. Of course, the law provides that Saturday and Sunday in Orleans Parish shall be legal holidays, or a portion thereof, together with other legal holidays, as set out in the statute. There is also provided in the Constitution a vacation period. Among the duties and powers as set forth under the provisions of L.S.A.-R.S. 15:17, defining the duties of the District Attorney, the law provides in part, quoting only the first of it:

> "Subject to the supervision of the Attorney General, as hereinafter provided, the District

> Attorney shall have entire charge and control of every criminal prosecution instituted or pending in any parish wherein he is District Attorney, and shall determine whom, when, and how he shall prosecute."

This means that the District Attorney has complete control of the fixing of cases for trial and, as referred to in this trial, he is the "Master of the Docket" as to ordinary fixings. It is usually only where a defendant has demanded a speedy trial, to which he is entitled, and the District Attorney refuses to fix it, that the Court may step in and order trial. Otherwise, the District Attorney, under this provision of the law, fixes the docket and assigns or asks that cases be assigned for trial. I do not believe the record shows that any judge at any time ever refused to fix a case for trial when so requested by the District Attorney, with the exception that Judge J. Bernard Cocke did not fix any cases for trial on Friday of each week. He assigns as his reason that that was the day each week that he used to research in the Law Library in the Supreme Court Building.

At this juncture, I would like to digress and state that a district judge must necessarily study cases and research the law in making his rulings and writing his per curiams on the various bills of exception and other matters connected with the trial of cases. It requires many more hours of work on his part in this connection than those actually spent sitting on the bench. As an illustration, I have been working many more hours on

the study of this particular case than I have spent hearing it. Also, a judge is on call, you might say, practically 24 hours a day, as there are many times that persons are in trouble or authorization must be obtained from the judge to take appropriate action, such as the matter of bail and other matters that might arise. There are also many motions and other matters taken up in chambers by the judge, and the actual time spent on the bench is not necessarily the largest part of the work that he does. This is a fact that is often overlooked.

I think it is recognized that public officials may be criticized more severely than the average citizen, as by offering themselves for public service they could and should be subject to more criticism. However, this has its remedies if abused.

The right of free speech is a very noteworthy and sensible provision of the Constitution of the United States and of the Constitution of the State of Louisiana. I believe very firmly in this right, so long as it is not abused, and firmly defend it, so long as it does not encroach upon the rights of others as to the protection of their honesty, integrity, reputation, and good name, without just cause.

I might make the statement here that I made on the trial of the motion. I believe it is related in respect to Justice Oliver Wendell Holmes of the United States Supreme Court that, in discussing the question of freedom of speech, he made the statement that this

does not go so far as to allow a person to shout "Fire" in a crowded theater.

Legitimate criticism of public officials should never be abridged. However, I cannot subscribe to the theory that all acts of public officials may be criticized in a defamatory manner with impunity and that the party defamed may not have adequate remedy under the law. A public official or any other person would then be placed in the position of first having to resort to resentment of the unjust criticism or defamation by resorting to physical violence, which would be abhorrent, or, secondly, if defamed publicly in the press, it would mean that he would have to conduct a running fight in the press in seeking to defend himself, or, thirdly, he must otherwise suffer in silence the opprobrium that would be attached to him as a result of the defamatory statement, and, if he does not defend himself, there would be many people who would accept the defamatory statement as true.

Therefore, our lawmakers have seen fit to incorporate in our statutes the right of redress for defamatory statements and a legal method to defend one's good name, honor, integrity, and reputation, so that the right of free speech might not be carried to such an excessive extent that one defamed would not have any legal remedy.

Before passing to a discussion of the questions of law raised in this case, I might say that the evidence convinces me that the statement charged in the bill of

information is a dafamatory statement within the intendment of the law as to defamation and false in its essential particulars.

The statement and the evidence convince me that it has exposed the Judges of the Criminal District Court to hatred, contempt, and ridicule in depriving them of the benefit of public confidence, of social intercourse, within the intendment of L.S.A.-R.S., Title 14, Section 47, et sequitur.

The Defendant in this case is pleading qualified privilege under the provisions of L.S.A.-R.S., Title 14, Section 49. The Court finds that if there exists a qualified privilege, then the State is required to prove that actual malice existed, whether the publication is true or false, if the publication or expression is a comment made in the reasonable belief of its truth, upon the conduct of a person in respect to public affairs.

Malice is defined in Black's Law Dictionary, in part, as:

> "The intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent."

It is further defined in Webster's Third New International Dictionary as

> "Intention or desire to harm another usually seriously through doing something unlawful or otherwise unjustified; revengeful or unfriendly feelings; ill will, enmity."

It has been defined in several jurisdictions as embracing spite and vindictiveness. *(Words and Phrases,* 26, p. 32.) There are many other definitions of *malice* and *actual malice,* and the question of whether or not malice existed will be proven or not proven by the facts in the individual cases.

The above-quoted provisions of L.S.A.-R.S. 14:47 et seq. are a result of the codification of the law which formerly covered oral and written defamation and has combined libel and slander in a single crime entitled "defamation."

Counsel for the Defendant very strongly objected to the admissibility of the statements made upon other occasions by the Defendant with reference to this particular defamatory statement. The Court believes that those statements were admissible for the reason that the question of actual malice is one about which the Defendant would know best—it is solely within his heart or mind—as to hatred, ill feeling, enmity, spite, vindictiveness, or a desire to injure another, and for other legal reason, as set forth in the provisions governing that in Title 14 of our Revised Statutes. We cannot probe the mind or heart of the person to find these answers, other than by what they might do or say to evidence this. The best evidence of what might have existed could be shown by what might have been said or done with reference thereto, and, therefore, these statements were admissible for the purpose of showing malice only. They show the state of mind that the Defendant had on and from the date of the

original defamation up to and including the date the last one was issued and convince me that it was a steadfast position of ill will and enmity arising out of a dislike of the fact that the Judges refused to sign certain motions for him. This right, to refuse to sign, the Judges had. The Judges had a right to refuse to sign for the reason that the Act placed upon them the responsibility of approving them and it was evidently a check on the validity of the accounts. Therefore, the District Judges had a certain responsibility in this matter to see that the supporting affidavits or vouchers or bills or proof were presented at the time they were requested to sign the motions.

Counsel has raised in his argument of Monday that the District Judges have never explained to the District Attorney why they did not approve his motions. However, the evidence does not reflect that the Defendant had ever made any effort to go to them and ask them for an explanation or sit down with them and try to work the matter out, and, while he was not required to do that, I think that would have been the proper thing to do. It is true that he attended an en banc session of the Judges and they discussed this matter, but I believe the evidence reflects that the rule was already in effect at the time he went in that afternoon.

There have arisen in this case several legal propositions which I will discuss in passing. Some of the Judges, complaining witnesses, take the position that L.S.A.-R.S.14:—I believe that is 15:571.11, as herein-

above quoted is unconstitutional as being in violation of the Home Rule Charter. I do not find it necessary for me to pass upon this question, because it cannot be raised collaterally and its constitutionality is not under attack, other than the statement of the witnesses as to what they believe. Also, I do not believe this was the motivating influence causing the Judges to adopt the rule that they did.

Also, the question has been raised in the testimony of some of the judges, who were witnesses on behalf of the State, that the District Attorney had no police powers or investigative powers in the manner in which he was conducting the investigation of this came under the provisions of Section 16, Act 301 of 1946, which provides—I will read a portion of that Act—as follows:

> ". . . there is hereby created and established, a Department of Police of the City of New Orleans, which shall be solely responsible for the discharge of all police functions herein granted in and for the City of New Orleans and the Parish of Orleans."

Then it refers to the places that they will inspect and police, including:

> ". . . . all houses of ill-fame or prostitution and houses where common prostitutes reside or resort; all lottery offices unauthorized by law, policy or bucket shops;"

and so forth.

The word *solely*, which is used at the beginning of this section, is defined by Webster's Third International Dictionary as meaning:

> "Simply, alone; to the exclusion of alternate or competing things as persons, purposes, or duties."

For the same reasons assigned above, I do not think that it is necessary for me to pass upon this question as it is not an issue in this case of defamation and was not the exerting influence for the imposition or invoking of the five-out-of-eight rule as to the approval of funds for expenditures under the Fines and Forfeitures Act hereinabove quoted.

I gather from the evidence that this action was based on the belief that the Defendant was being extravagant in the expenditure of funds, spending them excessively without supporting vouchers and affidavits or bills or showing of the necessity thereof. Also, it was brought about by reason of the fact that some of the Judges thought the District Attorney might have been playing one Judge against the other to get the bills approved. However, the sole question presented to this Court at this time is whether or not there has been sufficient proof under the law of the defamation of the eight Judges of the Criminal District Court of the Parish of Orleans, whether or not there is a qualified privilege, as pleaded by the Defendant, and, if so found, whether or not the State has proved actual malice such as would destroy qualified privilege.

The cases are legion in our jurisprudence with reference to criminal defamation and civil libel, with complete discussions of *privilege*. Some of the cases are on the question of civil libel, others on the question of criminal libel and defamation. Of course, there would be a difference in the matter of proof in a civil libel and a criminal case, but the principle of law is practically the same or closely related.

Some of the more prominent and pertinent cases discussed are: *State v. O'Donnell*, 141 La. 887, 75 So. 811; *State v. Lambert*, 188 La. 968, 178 So. 508; *Deshotel v. Thistlewaite*, 240 La. 12, 121 So. 2d. 222; *Kennedy v. Item Co., Inc.*, 213 La. 347, 34 So. 2d. 886; *Madison v. Bolton*, 234 La. 997, 102 So. 2d. 433; *Cadro v. Plaquemines Gazette*, 202 La. 1, 11 So. 2d. 10.

I do not see that any useful purpose could be served by a long discussion of the law and legal principles, because I am sure that all counsel for both sides, as well as I, have read these cases and are familiar with the principles of law. I have heretofore discussed most of them on preliminary motions to quash, etc., and in connection with the special charges that I gave, and I will have to discuss them again later on perhaps.

This brings us to a discussion of whether there was actual malice on the part of the Defendant in making the alleged defamatory statement on November 2, 1962. I am of the opinion that there was this malice intended at the time as a result of either anger, provocation, ill feeling, spite, or enmity, by the requirement of the

Judges in requiring the five signatures for the approval of his motions for expenditures and failure to approve the motions for him without question.

As previously stated, under these circumstances, no one should speak or write until after calm deliberation and cool circumspection, which would lead to a reasonable statement.

I am further of the opinion that this malice existed at the time of the making of the statement and continued to exist.

After a careful review of the evidence and serious consideration of the law in this case, I am of the opinion that there was no qualified privilege under the provisions of L.S.A.-R.S., Title 14, Section 49, wherein it is provided that the publication, expression or comment is made in a reasonable belief of the truth of the conduct of the person in respect to public affairs. There are other provisions also in that same article, and it will be taken for the purpose of this opinion as being embraced in its entirety, L.S.A.-R.S., Title 14, Section 49, in the words as set forth in that.

The word *reasonable* is defined in Webster's Third New International Dictionary as:

> "(a) Being in agreement with right thinking or right judgment: not conflicting with reason; not absurd; not ridiculous. (b) Being or remaining within the bounds of reason; not extreme; not excessive."

The word *reasonable* is defined in Webster's Collegiate Dictionary as:

> "(1) Having the faculty of reason; rational. (2) Just; fair-minded; not beyond the bounds of reason, logic."

Words and Phrases, Volume 36 gives us several definitions:

> "To be consistent with that of the prudent man in like circumstances.
>
> "It connotes action according to the dictates of reason—such as is just, fair, and suitable in the circumstances."

Again *Words and Phrases,* Volume 36, gives us:

> "The expression 'honest belief' does not differ from the expression 'reasonable belief.' Both are used conjunctively and disjunctively by different courts.
>
> "'Reasonable belief' * * * must be a belief begotten by attendant circumstances fairly creating it, and must be honestly entertained."

Unquoting from any authorities, I might also observe that the word *reasonable* means just what it says: not a belief founded on caprice, fancy, conjecture, or speculation, but is such that an ordinarily prudent man might be able to assign a just and fair reason for.

After considering all of the evidence in this case, I can only conclude that the Defendant could not have reasonably had any honest or reasonable belief as to

the truth of this statement. It is inconceivable to me that the Defendant could have had a reasonable belief, which could be defined as an honest belief, that not one but all eight of these Judges of the Criminal District Court were guilty of what he charged them with in the defamatory statement. These men have been honored by the citizens of Orleans Parish with very high offices, and some of them for a long number of years. It is inconceivable to me that all of them could have been guilty of all of the accusations made against them. Therefore; I do not believe that the qualified privilege under L.S.A.-R.S., Title 14, Section 49, is applicable in this case, under this or any other part of this article.

However, were it conceded for the purposes of argument that he did have a reasonable belief as to the truth of the statement and his statement was entitled to be considered a qualified privilege, I am of the opinion that the State has proved actual malice in its many definitions to destroy the qualified privilege under any provisions of L.S.A.-R.S., Title 14, Section 49.

It, therefore, becomes my duty as a judge to apply these principles of law to the factual situation herein, and I am doing so under the painful realization of the import of my decision. If the Defendant District Attorney were engaged in a bona fide effort to suppress vice, gambling, prostitution, B-drinking, and other violations of the law in a legal manner, I think that he should be commended. I have never favored

these violations of the law and consistently over the years that I have been on the bench I have charged the grand juries of the parishes of my District specifically on gambling and houses of ill-fame and have rigidly enforced these laws where there has been proven a transgression of them.

I do not find that there is any evidence in the record that any of the Judges who were defamed have expressed any desire to impede the District Attorney in the enforcement of these laws in order to favor these law violators. I believe that is well established by the record, by the testimony of the Judges of the Criminal District Court of Orleans Parish, that the overwhelming majority of the people of the Parish of Orleans are in favor of the suppression of vice, gambling, prostitution, B-drinking, operation of clip joints, and other illegal activities connected therewith. This sentiment is paramount among all of the citizenry of our State.

It is my studied and carefully considered opinion in this case that the Judges had no intention of impeding the suppression of vice, B-drinking, gambling, or prostitution, as such, but that the difficulty with the District Attorney arose by reason of the fact that they were of the opinion that the money was being extravagantly or excessively expended on other items without supporting affidavits, bills or vouchers, or a proper showing. However, I believe the evidence reveals that there is approximately $1,500.00 in unpaid amounts which were supposed to have been expended in the suppression of

vice, prostitution, B-drinking, and other illegal activities. The opinion of the witnesses was that the law did not permit this expenditure. The Legislature left to the discretion of the Judges the question of approving these bills. The Defendant has his own responsibility to the people and the Judges have theirs. Each should be allowed to exercise their judgment and discretion in the manner of his choice as to his duties, so long as it may be lawful.

I would like to also express at this time, and to particularly emphasize, that I deplore vice or corruption in any form, such as gambling, prostitution, B-drinking, clip joints, or any other illegal activity. I stand steadfast for the strict enforcement of those laws, as these crimes should be suppressed wherever found, but I cannot say that one law might be violated to carry out the effect of other laws. All laws should be respected, not only by the average citizen, but particularly by officers who are charged with the duty of enforcing those laws. To say that one law might be violated in order to carry out the enforcement of another law is to compound a wrong, and two wrongs never make a right.

As I stated previously, I reserve the right to further comment, to make any further comment on this that I may deem necessary, on this proposition of law, but these will be taken as comments of my appreciation of the evidence, and insofar as they may be in accord with the evidence, they will be taken, and insofar as

they may be in conflict with what the record reveals, the record, of course, will control as to the comments.

I now will assign as my reasons for judgment that it becomes my duty to determine whether or not the Defendant be guilty or not guilty. Under the facts and the law of this case, the evidence convinces me beyond a reaonable doubt that the Defendant in this case is guilty, and I so find him Guilty as Charged.